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April 17, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. S.W., CY-B402
Washington, D.C. 20554

Re: In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the State of Minnesota
WC Docket No. 03-90

Dear Ms. Dortch:

Enclosed for electronic filing are the comments of the Minnesota Public Utilities Commission (MNPUC) Regarding the Application of Qwest Communications International, Inc. for Authority to Provide In-Region Interlata Services in Minnesota.

The four Minnesota Commissioners who participated in this proceeding agree as to the recommendation for 12 of the 14 checklist items in 47 U.S.C. § 271(c)(2)(B), but have reached no consensus with respect to Checklist Item No. 2 and No. 14. In addition, they reached no consensus with respect to the public interest recommendation under 47 U.S.C. § 271(d)(3)(C). Chair Leroy Koppendrayer recommends the Federal Communications Commission (Commission) find that Qwest has met all the requirements and approve the application. Commissioners Phyllis Reha, Gregory Scott and R. Marshall Johnson recommend that the Commission deny Qwest's application.

Any questions regarding the filing of this application may be directed to me at 651-297-1852 or by email to karen.hammel@state.mn.us.

Sincerely,

KAREN FINSTAD HAMMEL
Assistant Attorney General

(651) 297-1852

Enclosures
AG: #840766-v1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-90
for Authorization to Provide In-Region,	)	
InterLATA Services in the State of Minnesota	)	

April 17, 2003

COMMENTS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION REGARDING THE APPLICATION OF QWEST COMMUNICATIONS INTERNATIONAL, INC. FOR AUTHORITY TO PROVIDE IN-REGION INTERLATA SERVICES IN MINNESOTA

LeRoy Koppendrayer, Chair
R. Marshall Johnson, Commissioner
Phyllis Reha, Commissioner
Gregory Scott, Commissioner
Ellen Gavin, Commissioner (not participating)

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I. EXECUTIVE SUMMARY

The Minnesota Public Utilities Commission (MNPUC) appreciates this opportunity to explain the process that was used to develop the record regarding the application of Qwest Communications International, Inc. (Qwest) for authority under Section 271 of the Telecommunications Act of 1996 (the Act) to provide in-region interLATA services in the state of Minnesota. The process of developing the factual record in Minnesota was lengthy and involved the active participation of numerous parties. The extensive record has been provided to the Federal Communications Commission (FCC or the Commission) by Qwest.

During the course of examining Qwest's Minnesota application, extensive discovery and evidentiary hearings were conducted and the parties were provided opportunities to brief the various matters for the administrative law judges (ALJs) assigned to these cases. Upon receipt of the separate ALJ reports, parties provided written exceptions to the ALJs' findings for the MNPUC's consideration and had an opportunity to provide oral arguments to the MNPUC. For the one matter not referred to the Minnesota Office of Administrative Hearings, i.e., the performance assurance plan, the MNPUC held three rounds of comments and three public meetings prior to adopting a plan for Qwest.

A review of the record developed in Minnesota should satisfy the Commission that the MNPUC has fully performed its investigative and review functions under the Act. Qwest 271 matters were considered by four commissioners in Minnesota: Chair LeRoy Koppendrayer, Commissioner Phyllis Reha, Commissioner Gregory Scott, and Commissioner R. Marshall Johnson. Commissioner Ellen Gavin recused herself from the proceeding.

The MNPUC has collectively determined that Qwest has satisfied 12 of the 14 Checklist Items in 47 U.S.C. § 271(c)(2)(B), but did not reach a collective determination with respect to Checklist Items No. 2 and No. 14. Therefore, the MNPUC will present combined comments on all Checklist Items except No. 2 and No. 14. The MNPUC also did not reach a collective determination regarding public interest issues. Consequently, Chair Koppendrayer and Commissioner Reha submit individual comments regarding Checklist Items No. 2 and No. 14, as well as public interest issues; and Commissioners Scott and Johnson submit joint comments regarding Checklist Items No. 2 and No. 14, as well as public interest issues.

In summary, Chair Koppendrayer finds that Qwest has satisfied all checklist and public interest requirements, and respectfully recommends that Qwest's 271 Application for Minnesota be approved. Commissioner Reha finds that Qwest has not satisfied neither Checklist Item No. 14 nor the public interest requirement, and respectfully recommends that Qwest's 271 Application for Minnesota be denied. Commissioners Scott and Johnson find that Qwest has satisfied neither Checklist Items No. 2 and No. 14 nor the public interest requirement, and respectfully recommend that Qwest's 271 Application for Minnesota be denied. The Commissioners' separate statements are included with these comments as Attachments 1-3.

II. PROCEDURAL HISTORY

The Telecommunications Act of 1996 allows entry by a Bell Operating Company (BOC) into in-region interLATA and interstate telecommunications services upon compliance with certain provisions of 47 U.S.C. § 271. Section 271 requires the Federal Communications Commission (FCC or the Commission) to make certain findings before approving a BOC application, including the following: 1) the BOC has fully implemented the competitive checklist contained in § 271(c)(2)(B); 2) the BOC's requested authorization will be carried out in accordance with the requirements of § 272; and 3) the BOC's entry is consistent with the public interest, convenience, and necessity. Thus, the BOC must make state-specific evidentiary showings and separately identify each state's relevant performance data.

State commissions have the responsibility under §271(d)(2)(B) to advise the FCC whether the BOCs meet the fourteen point competitive checklist. The FCC has asked state commissions to fully develop a factual record regarding the BOCs' compliance with the requirements of §271 and the status of local competition. The FCC also encourages the state commissions to resolve factual disputes whenever possible.

On September 11, 2001, the Minnesota Public Utilities Commission (MNPUC) issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, Docket No. P-421/CI-96-1114. The MNPUC referred the matter to the Office of Administrative Hearings (OAH) for contested case proceedings. Administrative Law Judges (ALJs) held contested case hearings to determine whether Qwest met the non-OSS (operations support systems) checklist items (Docket P-421/CI-01-1370), the OSS[1] related checklist

[1]OSS or operations support systems are the various systems, databases, and personnel used by incumbent LECs to provide service to their customers.

items (Docket P-421/CI-01-1371), the separate affiliate requirements (Docket P-421/CI-01-1372), the public interest and track A requirements (Docket P-421/CI-01-1373), and the pricing requirements (Docket P-421/CI-01-1375).[2] An additional proceeding on Qwest's performance assurance plan (PAP), Docket P-421/AM-01-1376, was handled by the MNPUC without referral to the OAH.

The ALJ's report on the non-OSS checklist items (Checklist items 3, 7, 8, 9, 10 and 12), Docket No. P-421/CI-01-1370, was submitted to the MNPUC on May 8, 2002. *See* Appendix K, Vol. 2, Tab 138 of Qwest's March 28, 2003 § 271 Application for Minnesota (hereinafter referenced as "Minn. App."). Exceptions to the ALJ's Report were received from AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (AT&T), Qwest Corporation (Qwest), and the Minnesota Department of Commerce and Office of the Attorney General (together DOC/OAG) on May 28, 2002 and from the CLEC Coalition[3] on May 29, 2002. Replies were received from MCI WorldCom Communications, Inc. (WorldCom) on June 6, 2002, and from Qwest on June 7, 2002. In response to the ALJ's Report, Qwest filed additional information on June 3, 2002. Commissioners and staff held an informal open work session on the matter on June 29, 2002. The MNPUC first considered Qwest's compliance with the non-OSS checklist items at an open meeting on July 9, 2002. The MNPUC subsequently issued a Notice on July 15, 2002, directing Qwest to submit filings to address specified areas. Qwest submitted its compliance filing on August 30, 2002. Reply comments were filed on September 16, 2002. Surreply comments were filed on November 7, 2002. The MNPUC further considered the non-OSS checklist items at an open meeting on March 5 and 6, 2003, and again on April 8, 2003.

The ALJ's report on the OSS related checklist items (Checklist Items 1, 2, 4, 5, 6, 11, 13 and 14), Docket No. PO-421/CI-01-1371, was submitted to the MNPUC on January 28, 2003. *See* Minn. App., Appendix K, Vol. 3, Tab 317. Exceptions were filed

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[2]An additional docket, P-421/AM-01-1374, was originally opened to review Qwest's SGAT. However, by MNPUC order dated November 13, 2001, the MNPUC clarified its intent that only SGAT issues not covered by existing interconnection agreements were referred to the Office of Administrative Hearings. In his Seventh Prehearing Order, the Administrative Law Judge granted the Minnesota Department of Commerce's motion to consolidate any remaining SGAT issues into the OSS docket (Docket No. P-421/CI-01-1371).

[3]The CLEC Coalition is a coalition of small CLECs in Minnesota, including Ace Telephone Association; BEVCOMM, Inc.; Hutchinson Telecommunications, Inc.; Mainstreet Communications Inc.; NorthStar Access, LLC; Otter Tail Telcom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communications Inc.; Unitel Communications; U.S. Link, Inc.; and VAL-Ed Joint Venture, LLP, d/b/a 702 Communications.

by WorldCom on January 31, 2003, and by the DOC, Qwest, Covad Communications Company (Covad), the CLEC Coalition and AT&T on February 3, 2002. Replies to exceptions were filed by AT&T, the CLEC Coalition, the DOC, WorldCom and Qwest on February 10, 1003. Qwest also filed updated Statements of Generally Available Terms (SGATs) with the MNPUC on February 3, 2003, March 3, 2003, and on March 17, 2003[4]. The MNPUC considered the OSS checklist items at an open meeting on March 5 and 6, 2003, and again on April 8, 2003.

The ALJ's report on the separate affiliate proceeding, Docket No. P-421/CI-01-1372, was submitted to the MNPUC on March 15, 2002. *See* Minn. App., Appendix K, Vol. 4, Tab 5. Exceptions to the ALJ report were filed by Qwest and the DOC on April 3, 2002 and by AT&T on April 5, 2002. On April 15, 2002, Qwest filed replies to exceptions. The MNPUC met to consider the issues in this case at an open meeting on June 18, 2002, and again on October 24, 2002.

The ALJ's report on public interest, Docket No. P-421/CI-01-1373, was submitted to the MNPUC on August 20, 2002. *See* Minn. App., Appendix K, Vol. 5, Tab 9. Exceptions to the ALJ's report were submitted on September 9, 2002, by AT&T, WorldCom, the DOC, the CLEC Coalition and the Minnesota Independent Coalition.[5] Replies to exceptions were filed by Qwest on September 19, 2002. The MNPUC considered the record on public interest at an open meeting on March 5 and 6, 2003, and again on April 8, 2003.

In the MNPUC's pricing proceeding, Docket No. P-421/CI-01-1375, the ALJ's report was submitted on August 6, 2002. The MNPUC issued its Order Setting Prices and Establishing Procedural Schedule on October 2, 2002, and its Order Denying Reconsideration on November 26, 2002. *See* Minn. App., Appendix K, Vol. 7, Tab 211. On February 18, 2003, Qwest submitted a compliance filing containing the unbundled network element (UNE) prices as ordered by the MNPUC. The MNPUC approved Qwest's compliance filing by its Order Accepting Filing And Opening New Docket on March 24, 2003.

Finally, in the proceeding to address Qwest's Performance Assurance Plan, Docket No. P-421/AM-01-1376, the MNPUC issued its Order Adopting Plan and Setting

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[4] The MNPUC understands that Qwest has also filed the March 17, 2003 version of its Minnesota SGAT with the FCC in its March 28, 2003 Minnesota Application.

[5]The Minnesota Independent Coalition is a coalition of approximately 80 independent ILECs serving primarily rural areas in Minnesota.

Further Procedural Schedule on July 29, 2002, and its Order On Reconsideration Amending Performance Assurance Plan on November 26, 2002. *See* Minn. App., Appendix K, Vol. 8, Tabs 21 and 31. Qwest submitted its compliance filing on February 18, 2003[6]. Qwest's compliance filing was considered at an open meeting on April 8, 2003.

The MNPUC's comments to the FCC on Qwest's § 271 application for Minnesota are based on the information developed through all of the above proceedings.

III. SECTION 271(C)(1)(A) — TRACK A REQUIREMENTS

The Track A requirements of § 271(c)(1)(A) require a BOC to demonstrate that 1) Qwest has one or more binding agreements with CLECs that have been approved under section 252 of the Act; 2) Qwest provides access and interconnection to one or more unaffiliated competing providers of telephone exchange service; 3) these competing providers collectively provide telephone exchange service to residential and business subscribers; and 4) these competing providers offer telephone exchange service to business or residential customers either exclusively over their own telephone service facilities, or predominantly over their own telephone service facilities in combination with resale. For purposes of this analysis, "own" telephone service facilities includes both facilities-based competitive local exchange carriers (CLECs) and CLECs leasing unbundled network elements from the BOC.

Based on the record developed in Minnesota, the ALJ found that as of October 31, 2001, Qwest had entered into 80 binding and approved wireline interconnection agreements in Minnesota. Minn. App., Appendix K, Vol. 2, Tab 99, ¶ 17 (ALJ Findings of Fact, Conclusions of Law and Recommendation in PUC Docket No. P-421/CI-01-1373). None of the 80 approved interconnection agreements is with a provider affiliated with Qwest. Some of the CLECs do, however, have more than one interconnection agreement. As of October 31, 2002, 64 CLECs were actively purchasing access and interconnection wholesale services in Minnesota. In total, as of October 31, 2001, Qwest was providing 150,129 business and residential access lines via stand alone unbundled network element (UNE) loops and UNE-platforms, 89,944 lines for resale, and 112,556 interconnection trunks to CLECs in Minnesota. Of the 89,944 resale lines, Minnesota CLECs provided 47,369 business and 42,575 residential access lines. *Id.* at ¶ 18.

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[6] The MNPUC understands that Qwest filed its February 18, 2003 version of the MPAP with the FCC in its March 28, 2003 Minnesota Application.

While Qwest's actual § 271 filing with the FCC for Minnesota includes updated figures, based on the record developed earlier in Minnesota, the MNPUC has no reason to disagree with the ALJ's conclusion that

> [t]he record demonstrates that Qwest has approved interconnection agreements with unaffiliated competing providers that serve a substantial number of residential and business subscribers predominantly over their own facilities. Qwest has demonstrated that it meets the requirements of § 271(c)(1)(A), the Track A test.

Id. at ¶ 30.

IV. SECTION 271(C)(2)(B) — COMPETITIVE CHECKLIST

A. Performance Data.

Operational Support Systems (OSS) are the systems Qwest uses to communicate with, and provide services to, its CLEC competitors. Access to fair, efficient and nondiscriminatory operation of those systems is considered critical to the existence of competition in the local exchange market. Public utilities commissions from 13 states within the 14-state Qwest region (all states except Arizona), worked cooperatively among themselves, and with independent contractors, to conduct extensive testing of Qwest's operations support systems (the ROC OSS test). The OSS performance results are a key element in determining whether Qwest satisfies the checklist criteria.

The ROC OSS test included analyses of the following:

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- Pre-Ordering, Ordering and Provisioning Functional Evaluation
- Order Flow-Through Evaluation
- Pre-Ordering, Ordering and Provisioning Volume Performance Test
- Maintenance and Repair (M&R) Functionality and End-to-End Trouble Report Processing Tests, including M&R Volume Test
- Billing, Usage and Carrier Bill Functionality Test
- Competitive Local Exchange Carrier Support Processes and Procedures Review
- Change Management Test
- Performance Measure Audit

The Final Report in the ROC OSS test was issued on May 28, 2002. That report has been reviewed by the FCC in all previous Qwest § 271 filings and there is no need to go into greater detail here. The performance results as developed under the criteria of the ROC OSS test are relied upon by Qwest in its Minnesota § 271 application. Those

performance results, as submitted in the proceedings before the MNPUC, have been relied upon in reviewing the checklist items.

The ALJ addressed performance issues in his January 28, 2003 report in Docket P-421/CI-01-1371. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 213-347. Performance issues with which the ALJ raised concerns related to the impact of pending orders, which the MNPUC discusses with respect to Checklist Item No. 4 below, and billing, which is discussed under Checklist Item No. 2 below. *Id.* at ¶¶ 269-273 and ¶¶ 302-324, respectively.

The ALJ also discussed the Change Management Process (CMP), the Stand Alone Test Environment (SATE), and win-back issues and found Qwest compliant in these areas for § 271 purposes. *Id.* at ¶¶ 328-347. The MNPUC agrees with the ALJ's findings on the CMP, SATE and win-back.

B. Checklist Item No.1 — Interconnection and Collocation.

Checklist Item No. 1 requires the BOC to offer interconnection in accordance with the requirements of 47 U.S.C. §§ 251(c)(2) and 252(d)(1). Issues regarding Qwest's compliance with this checklist item were addressed in the ALJ's January 28, 2003 report in the OSS proceeding. *Id.* at ¶¶ 17-73, Conclusion of Law No. 4, p. 25. The ALJ found that Qwest met the requirements of Checklist Item No. 1 except for Qwest's requirement that the absence of a forecast from a CLEC automatically entitles Qwest to a 60-day extension of the 90-day interval for provisioning a collocation. In response to the ALJ's finding, Qwest agreed to remove the 60-day extension language from its SGAT. *See* Minn. App., Appendix K, Vol. 3, Tab 321 (Qwest's Exceptions to ALJ Report in MNPUC Docket No. P-421/CI-01-1371).[1]

At the MNPUC meeting on April 8, 2003, Qwest agreed to remove the following sentence from Section 9.2.2.5 of its March 17, 2003 SGAT at the request of the CLEC Coalition: "If Extension technology is requested by the CLEC, but is not required to meet technical standards, then Qwest will provide the requested Extension Technology and will charge CLEC." MNPUC Appendix A, excerpts of Transcript of MNPUC April 8, 2003 Public Meeting, at p. 9. Qwest also agreed to eliminate the DUF charge per record in SGAT Exhibit A - 12.3, the power charge per foot in SGAT Sections 8.3.17 and 8.3.1.14, the reference to UDF loop fiber and E-UDF Interoffice Facilities in SGAT

[1] In its Exceptions, Qwest states that it is submitting under separate cover an updated Minnesota SGAT to reflect all changes Qwest promised it would make and also the changes mandated in the ALJ's Report, excepting the four issues it challenged in the Exceptions. *See* Qwest's Exceptions, Minn. App., Appendix K, Vol. 3, Tab 321 at 2, fn.1.

Section 9.7.5.x, and the reference to EUDIT and UDIT in SGAT Section 9.6 at the request of the Department of Commerce.

With the changes discussed above, the MNPUC finds that Qwest meets the requirements of Checklist Item No. 1.

C. Checklist Item No. 2 — Unbundled Network Elements (UNEs).

Checklist Item No. 2 requires that Qwest demonstrate that it is providing nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). The ALJ addressed issues regarding Qwest's compliance with this checklist item in the January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 74-118, 302-324, and Conclusion of Law No. 5 at p. 104. The ALJ found that Qwest has not demonstrated by a preponderance of the evidence that it provides nondiscriminatory access to network elements because of Qwest's reliance on UNE-Star as its unbundled network element product to the two largest CLECs in Minnesota. *Id.* at ¶ 97. The record in this proceeding, according to the ALJ, shows conclusively that UNE-Star does not meet the standards for a UNE-P offering, particularly with respect to billing accuracy. *Id.* at ¶¶ 310-324. The ALJ concluded that Qwest's application for § 271 approval for Minnesota should not be approved until Qwest has demonstrated that all UNE-Star lines have been converted to UNE-P and that its billing system is capable of meeting the appropriate performance measures for wholesale billing and providing accurate daily usage files (DUF) records to allow CLECs to appropriately charge for switched access. *Id.* at 104.

The MNPUC did not reach a collective decision regarding Checklist Item No. 2. MNPUC commissioners will address this checklist item in separate attached comments.

D. Checklist Item No. 3 — Poles, Ducts, Conduits, and Rights-of-Way.

Checklist Item No. 3 requires the BOC to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by it at just and reasonable rates and in accordance with the requirements of the Act. This checklist item was addressed in the ALJs' May 8, 2002 report in the MNPUC's non-OSS checklist items proceeding. *See* Minn. App. Appendix K, Vol. 2, Tab 138. The ALJs found that Qwest has demonstrated by a preponderance of evidence that it meets the requirements of Competitive Checklist Item No. 3. *Id.* at ¶¶ 15-57, and Conclusion No. 2 at p. 49. The MNPUC supported the ALJs' recommendation for Qwest to include an express permission or no-preclusion clause in all its future rights-of-way agreements. In addition, the MNPUC supported AT&T's arguments and directed Qwest to a) strike out language allowing variance of the 45-day response time, b) include a provision to provide access to

all publicly-recorded rights-of-way agreements, and c) provide evidence of the confidentiality agreement with the landowners in non-recorded agreements before Qwest can impose the consent or indemnification condition. The MNPUC also directed Qwest to respond to the CLEC Coalition's proposal regarding Express Facilities and access to records. Qwest agreed to the MNPUC's conclusions and incorporated the changes in its SGAT. With the changes, the MNPUC finds that Qwest meets the requirements of Checklist Item No. 3.

E. Checklist Item No. 4 — Unbundled Local Loops.

Checklist Item No. 4 requires that a BOC provide local loop transmission from the central office to the customer's premises, unbundled from local switching or other services. The ALJ addressed this checklist item in his January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 119-187, 269-273, and Conclusion 6, at p. 104. The ALJ found that Qwest has demonstrated by a preponderance of the evidence that it provides local loop transmission that is unbundled from local switching or other services, from the central office to the customer's premises, in accordance with 47 U.S.C. § 271(b)(2)(B)(iv) except for: DS1 loop intervals, conditioning charges, performance of line and station transfers (LSTs), access to mechanized loop testing (MLT) results in the manual process for loop pre-qualification, access to network interface devices (NIDs), and rejecting local service requests (LSRs) for shared loops due to pending orders. *Id.*

In response to the ALJ's recommendations, Qwest shortened the installation interval for DS1 loops in the SGAT to that recommended by the ALJ; Qwest removed any reference to conditioning charges in the SGAT; Qwest modified the SGAT to allow a line and station transfer to be completed within the interval that is the standard interval for provision of loops; Qwest changed its SGAT to indicate that, where an MLT has been conducted on a loop and the loop information is available, the information will be made available to the CLEC as part of the manual loop process if the CLEC so requests; and, Qwest modified its SGAT to allow CLECs to cap off the NID, consistent with the language ordered in Washington state. On the remaining ALJ issue of LSRs for shared loops being rejected if there is a pending order, Qwest agreed to use the change management process to establish a new process that would discontinue the need to wait for a voice order to complete before an order for DSL can be submitted.

At the MNPUC meeting on April 8, 2003, Qwest agreed to modify Section 9.2.2.8.7 of its March 17, 2003 SGAT to read:

> Upon CLEC request, Qwest will provide CLEC with the results that exist in Qwest's records of any mechanized loop test Qwest conducts or may have previously conducted in the provisioning of the Unbundled Loop. This will

> include, but is not be limited to, any hard copy results of the mechanized loop test or any electronic results retained by Qwest in the WFA database or any comparable data base. Qwest shall provide this information to CLEC via email within forty-eight (48) hours of Qwest's receipt of CLEC's request for this information.

See Transcript Excerpt of April 8, 2003 Public Meeting, MNPUC Appendix B, at pp. 25-29.

With the changes discussed above, the MNPUC believes that Qwest meets the requirements of Checklist Item No. 4.

F. Checklist Item No. 5 — Unbundled Local Transport.

Checklist Item No. 5 requires Qwest to provide local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services. This checklist item is discussed in the ALJ's January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 188-189, and Conclusion 7 at p. 104. The ALJ concluded that Qwest has demonstrated by a preponderance of the evidence that it meets this checklist item. *Id.* at p. 104. The MNPUC agrees.

G. Checklist Item No. 6 — Unbundled Local Switching.

Checklist Item No. 6 requires a BOC seeking Section 271 approval to demonstrate that it provides local switching unbundled from transport, local loop transmission, or other services. The ALJ addressed this checklist item in his January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 190-197, and Conclusion 8 at p. 104. The ALJ found that Qwest has demonstrated compliance with this checklist item. *Id.* at p. 104. The MNPUC concurs.

H. Checklist Item No. 7 — 911, E911, Directory Assistance, Operator Calls.

Section 271 (c)(B)(vii)(I), (II) and (III) requires a BOC to provide nondiscriminatory access to 911 and E911 services, and to directory assistance and operator call completion services. The ALJs' May 8, 2002 report in the MNPUC's non-OSS proceeding addressed Qwest's compliance with the 911 and E911 requirements. *See* Minn. App. Appendix K, Vol. 2, Tab 138, ¶¶ 72-74, and Conclusions 2-3 at p. 49. The ALJs concluded that there was insufficient evidence in the record to show Qwest's compliance with the 911 and E911 requirements, but allowed that Qwest may demonstrate compliance only by supplementing the record with additional data that

would allow the MNPUC to find that it has resolved the problems relating to unlocking the E911 database records. *Id.* at 49, Conclusion 3. The ALJs also found that Qwest should be allowed to make language changes to show that it offers Private Switch/Automatic Location Identification (PS/ALI) on a nondiscriminatory basis. *Id.* at ¶ 78. The ALJs found that Qwest made a prima facie showing of compliance with checklist item 7 (II) and (III), but the other parties demonstrated that Qwest does not provide Custom Routing and therefore cannot charge market-based rates for operator services and directory assistance. *Id.* at 85-104. The ALJs concluded that Qwest can remedy this failure by offering operator services and directory assistance as a UNE at cost-based rates. *Id.* at ¶ 104. The MNPUC supported the ALJ's recommendations and directed the following filings from Qwest: a) additional evidence regarding the solution to the problem of unlocking 911 records, b) the inclusion of language relating to PS/ALI, c) the inclusion of language relating to joint provisioning of facilities, and d) the offering of operator services/ directory assistance as UNEs at cost-based rates.

Qwest agreed to modify its SGAT language to resolve all the noted concerns except WorldCom's proposal for Qwest to provide OS/DA as UNEs at cost-based rates. At the MNPUC's meeting on March 5 and 6, 2003, WorldCom, withdrew its opposition to Qwest's handling of OS/DA for 271 purposes with the understanding that the Company may ask the MNPUC to address the issue under state authority. With Qwest's SGAT revisions, the MNPUC believes that Qwest has satisfactorily addressed the remaining issues and now meets the requirements of Checklist Item No. 7.

I. Checklist Item No. 8 — White Pages.

Checklist Item No. 8 requires a BOC to provide white pages directory listings for customers of the other carriers' telephone exchange service. The ALJs' May 8, 2002 report in the MNPUC's non-OSS proceeding addressed this checklist item. *See* Minn. App. Appendix K, Vol. 2, Tab 138, ¶¶ 107-121, and Conclusion 2 at p. 49. The ALJs concluded that, with language changes addressing WorldCom's concerns about the discriminatory provision of access to white pages listings, Qwest complies with this checklist item's requirements. *Id.* at ¶ 115. With the language changes made by Qwest, the MNPUC believes that it meets the requirements of Checklist Item No. 8.

J. Checklist Item No. 9 — Numbering Administration.

Checklist Item No. 9 requires that a BOC provide nondiscriminatory access to telephone numbers for assignment to other carriers' telephone exchange service customers, until the date by which telecommunications numbering administration, guidelines, plan, or rules are established. The checklist item mandates Qwest's compliance with numbering guidelines, plan, or rules. The MNPUC concurs with the ALJs' in the May 8, 2002 report in the MNPUC's non-OSS proceeding that Qwest meets

the requirements of checklist item 9. *See* Minn. App. Appendix K, Vol. 2, Tab 138, ¶¶ 125-132, and Conclusion 2 at p. 49.

K. Checklist Item No. 10 — Databases and Associated Signaling.

Section 271(c)(2)(B)(x) requires that the BOC provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion. The ALJs' May 8, 2002 report in the MNPUC's non-OSS proceeding addressed this checklist item. *See* Minn. App. Appendix K, Vol. 2, Tab 138, ¶¶ 137-157. The ALJs concluded that Qwest had made a prima facie showing of compliance, but WorldCom was able to challenge that showing. *Id.* The ALJ found that Qwest can remedy the situation by providing access to the calling name (CNAM) database by electronic download. *Id.* at ¶ 152. With WorldCom's withdrawal of its opposition to Qwest's manner of providing access to the CNAM database for 271 purposes, the MNPUC believes that Qwest meets the requirements of Checklist Item No. 7.

L. Checklist Item No. 11 — Local Number Portability.

Section 271(c)(2)(B)(xi) requires that the BOC demonstrate compliance with the applicable rules for local number portability (LNP). The ALJ addressed this checklist item in January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App. Appendix K, Vol. 3, Tab 317, ¶¶ 198-99, and Conclusion of Law No. 9 at p. 105. With Qwest's agreement to address CLEC concerns by modifying its SGAT to allow CLECs to delay the porting time in the managed cut process by providing notice by noon on the day following the scheduled due date, the ALJ found that Qwest demonstrates compliance with this checklist item. *Id.* at ¶ 198. With these changes, the MNPUC agrees.

M. Checklist Item No. 12 — Local Dialing Parity.

Section 271(c)(2)(B)(xii) requires a BOC to provide nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of § 251(b)(3). The ALJs concluded in the May 8, 2002 report in the MNPUC's non-OSS proceeding that the record demonstrates Qwest's compliance with the checklist item. *See* Minn. App. Appendix K, Vol. 2, Tab 138, ¶¶ 160-165, and Conclusion 2 at p. 49. The MNPUC agrees.

N. Checklist Item No. 13 — Reciprocal Compensation.

Section 271(c)(2)(B)(xiii) requires that a BOC's access and interconnection include reciprocal compensation arrangements in accordance with the requirements of

§ 252(d)(2). The ALJ addressed this checklist item in of the January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App. Appendix K, Vol. 3, Tab 317, ¶¶ 200-202, and Conclusion of Law No. 10 at p. 105. The ALJ determined that Qwest has demonstrated that it meets the requirements for this checklist item. The MNPUC concurs.

O. Checklist Item No. 14 — Resale.

Section 271(c)(2)(B)(xiv) requires Qwest to make telecommunications services available for resale by CLECs in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3). The ALJ addressed this checklist item in his January 28, 2003 report in the MNPUC's OSS proceeding. *See* Minn. App. Appendix K, Vol. 3, Tab 317, ¶¶ 203-212, and Conclusion of Law No. 11 at p. 105. Although the ALJ concluded that there were no issues regarding the availability of services for resale, he found that the terms under which those services are offered are asserted to be discriminatory in a variety of ways, including billing for termination liability assessments (TLAs), and that the unfiled agreements show price and service discrimination between CLECs. The ALJ concluded that Qwest cannot demonstrate compliance with this checklist item until Qwest has completed whatever corrective actions are required by the MNPUC in MNPUC Docket No. P-421/C-02-197, the Minnesota Department of Commerce complaint against Qwest concerning unfiled agreements ("Unfiled Agreements" docket), and Qwest ceases billing for TLAs or amends its billing practices to provide notice to consumers that such billing may not be appropriate. *Id.* at p. 105.

In response to the ALJ's finding, Qwest and the DOC have agreed to revised language for Qwest's SGAT regarding Qwest's billing practices for a customer that early terminates Qwest service to receive service from a CLEC offering services via resale of Qwest services. *See* Minn. App., Appendix K, Vol. 3, Tab 337. The MNPUC finds that this language resolves the outstanding TLA issues raised by the ALJ.

The MNPUC did not reach a collective decision regarding how the unfiled agreement docket affects Checklist Item No. 14. MNPUC commissioners address this aspect of Checklist Item No. 14 in their separate attached comments. *See* Attachments 1-3.

V. THE PUBLIC INTEREST — SECTION 271(D)(3)(C).

The MNPUC conducted a separate proceeding, Docket P-421/CI-01-1373, to determine whether Qwest's application to receive § 271 approval in Minnesota would be in the public interest. The FCC stated in its order approving Bell Atlantic's New York § 271 application that it views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors

exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 F.C.C. Rcd 3953, 4161, at ¶ 423 (1999).

Further, the FCC has developed three criteria to use in making the public interest determination: 1) it considers whether granting the application is consistent with promoting competition in the local and long distance telecommunications markets, 2) it looks for assurances that the BOC would continue to satisfy the requirements of § 271 after entering the long distance market by reviewing the BOC's performance plan, if it has one, and other available enforcement tools, and 3) it considers whether there are any remaining unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 F.C.C. Rcd 6237, 6375, at ¶¶ 267-269 (2001).

Additionally, the FCC has indicated its interest in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. *In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Service in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 F.C.C. Rcd 20543, ¶ 397 (1997). Because the success of the market opening provisions of the Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine the FCC's confidence that the BOC's local market will remain open to competition once the BOC has received interLATA authority. *Id.* While no one factor is dispositive, the overriding goal is to ensure that nothing undermines the conclusion, based on the FCC's analysis of checklist compliance, that markets are open, and will remain open, to competition. *Id.* at ¶ 391.

Under the first element of the FCC's public interest test, the Minnesota public interest proceeding examined the evidence from the Track A portion of the proceeding, the number of CLEC collocations completed by Qwest, the development of competition in rural areas, the number of residential subscribers receiving service from CLECs, and the level of market power Qwest retains in the residential market. *See* Minn. App.,

Appendix K, Vol. 5, Tab. 99, ¶¶ 35-52. Based upon the record developed to that point, the ALJ found that, "[a]ssuming Qwest satisfies the competitive checklist, there is no evidence in the record to suggest that recommending § 271 approval would be inconsistent with promoting competition in the local and long-distance markets." *Id.* at ¶ 52. The MNPUC concurs with the ALJ's finding.

The second element of the FCC's public interest analysis considers whether the BOC has provided adequate assurance that the local exchange market will remain open after the application is granted. A key part of the FCC's analysis has been to review whether the BOC has a state commission approved performance assurance plan. In Minnesota, the MNPUC approved a Minnesota Performance Assurance Plan ("MPAP"). *See* Minn. App., Appendix C, Vol. 1, Tab 13, and Appendix K, Vol. 8, Tabs 21 and 31 in *In the Matter of Qwest's Performance Assurance Plan (QPAP)*, Docket No. P-421/AM-01-1376, Order Adopting Plan and Setting Further Procedural Schedule (July 29, 2002), and Order On Reconsideration Amending Performance Assurance Plan (November 26, 2002).

Qwest's February 18, 2003 MPAP compliance filing in that proceeding was considered by the MNPUC on April 8, 2003. The MNPUC determined that Qwest's compliance filing contained certain language that had not been previously approved. *See* Transcript Excerpt of April 8, 2003 Public Meeting, MNPUC Appendix C, at 49-66. Consequently, Qwest agreed to withdraw its proposed language in Section 18.6.1 and replace it with a sentence reading: "Nothing in this MPAP constitutes a waiver of any party's right to appeal an order of the Public Utilities Commission." Qwest also agreed to delete Section 18.8. The MNPUC finds Qwest's MPAP acceptable with these changes.[12]

The MNPUC understands that the other areas that the FCC reviews under this portion of the public interest analysis are matters under the FCC's own jurisdiction, such as the FCC's enforcement authority under 47 U.S.C. § 271(d)(6) and its recently established "Section 271 Compliance Review Program." The MNPUC believes that Qwest has met the second element of the public interest analysis.

The final factor in analyzing the public interest is a review of the local and long-distance markets to ensure that there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of the application at issue. In the Minnesota public interest proceeding, twelve separate arguments were

[12] The MNPUC has not issued a written order addressing the April 8, 2003 changes to the MPAP.

raised regarding unusual circumstances and are addressed in the ALJ's August 20, 2002 report in the MNPUC's Track A and public interest proceeding: unfiled agreements, UNE pricing, intrastate access charges, structural separation, Qwest retail and wireless customer service complaints, CLEC complaints, CLEC failures, Touch America, win back, termination liability assessments, feature group C signaling, and Qwest's corporate attitude. *See* Minn. App., Appendix K, Vol. 5, Tab. 99, ¶¶ 57-76. With the exception of any determinations made in the unfiled agreements docket, the ALJ found that there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of Qwest's application. *Id.* at ¶ 77. However, the MNPUC did not reach a collective decision with regard to the unfiled agreements proceeding. MNPUC commissioners address this public interest factor in separate attached comments. *See* Attachments 1-3.

VI. SECTION 272.

Section 272 requires that a BOC establish a separate affiliate to provide in-region origination of interLATA telecommunications services. The BOC must follow the structural and nonstructural requirements of § 272 as safeguards to prevent discriminatory behavior by the BOC and its Section 272 affiliate against unaffiliated entities.

The MNPUC assigned the evaluation of Qwest's initial § 272 affiliate Qwest Communications Company (QCC) to an ALJ in the MNPUC's separate affiliate proceeding. The ALJ issued his report and recommendations in that proceeding on March 15, 2002, identifying various areas of noncompliance. Qwest responded to the ALJ's findings with its exceptions and also proposed modifications to address some of the ALJ's concerns. cite

On September 27, 2002, AT&T filed a motion with the MNPUC to reopen the record to accept additional evidence concerning whether Qwest and its new section 272 affiliate[13] will comply with Section 272. The MNPUC issued its Order Denying Motion To Reopen and Supplement the Record on December 5, 2002 in Docket No. P-421/CI-01-1372. Despite the admission of inappropriate accounting and financial reporting by Qwest, the MNPUC determined that administrative efficiency would not be served by reopening this proceeding, considering that the FCC would be addressing this issue, albeit for nine other states' applications then under consideration.

[13]Qwest created a new separate Section 272 Affiliate - QLDC in September 2002 to address issues and concerns by the FCC related to Qwest's GAAP compliance.

The MNPUC initiated this proceeding to evaluate the safeguards of Qwest's § 272 compliance. The record has been established for the benefit of the FCC for its consideration of the application by Qwest to provide interLATA telecommunications within the State of Minnesota. The MNPUC does not identify any concerns regarding Qwest's compliance with § 272.

VII. CONCLUSION.

The Minnesota Public Utilities Commission, the Minnesota Office of Administrative Hearings, the Minnesota Department of Commerce and numerous other parties in Minnesota have devoted significant resources to the development of a record upon which the Commission can assess Qwest's application to offer in-region interLATA service in the state of Minnesota. The MNPUC understands that the Commission will be diligent in its review and consideration of this matter. MNPUC Chair Koppendrayer respectfully recommends that Qwest's Minnesota 271 Application be approved. MNPUC Commissioners Reha, Scott and Johnson respectfully recommend that Qwest's Minnesota 271 Application be denied.

Dated: April 17, 2003

Respectfully submitted,

Minnesota Public Utilities Commission

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Executive Secretary

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ATTACHMENT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-90
for Authorization To Provide In-Region,	)	
InterLATA Services in the State of Minnesota	)	

April 17, 2003

SEPARATE COMMENTS OF CHAIR LEROY KOPPENDRAYER REGARDING CHECKLIST ITEMS #2, #14, And PUBLIC INTEREST ASPECTS OF QWEST'S MINNESOTA 271 APPLICATION

INTRODUCTION

I find, and recommend to the Federal Communications Commission (FCC), that the evidence in the Minnesota Section 271 proceeding fully supports approval of the Qwest Communications International, Inc. (Qwest) Application for Authority to Provide In-Region, InterLATA Services in Minnesota under Section 271 of the Telecommunications Act of 1996.

This recommendation is based on the lengthy process of developing the factual record in Minnesota with the active participation of numerous parties. During the course of examining Qwest's Minnesota application, extensive discovery and evidentiary hearings were conducted and the parties were provided opportunities to brief the various matters for the administrative law judges (ALJs) assigned to these cases. Upon receipt of the separate ALJ reports, parties provided written exceptions to the ALJs' findings for the MNPUC's consideration and had an opportunity to provide oral arguments to the MNPUC. For the one matter not referred to the Minnesota Office of Administrative

Hearings, the MNPUC held three rounds of comments and three public meetings prior to accepting a performance assurance plan for Qwest.

My review of the record developed in Minnesota shows that the MNPUC has fully performed its investigative and review functions under the Act. My comments and positive recommendation with respect to Qwest's application are based upon the record developed. That record fully supports a finding that Qwest has satisfied the 14 point competitive checklist and the public interest requirements for approval of its Section 271 application for Minnesota.

My recommendation departs from certain findings and conclusions of the ALJ. I will discuss three primary topics where the ALJ and I differ: Competitive Checklist Item No. 2, Nondiscriminatory access to network elements; Competitive Checklist Item No. 14, Telecommunications services available for resale; and, Public Interest considerations.

SECTION 271(C)(2)(B) – COMPETITIVE CHECKLIST ITEMS #2 AND #14

CHECKLIST ITEM NO. 2 — UNBUNDLED NETWORK ELEMENTS (UNES).

Checklist Item No. 2 requires that Qwest demonstrate that it is providing nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). Issues regarding Qwest's compliance with this checklist item were addressed in the ALJ's January 28, 2003 report in Docket No. P-421/CI-01-1371 at paragraphs 74 through 118, 302 through 324, and conclusion of law number 5. The ALJ found that Qwest has not demonstrated by a preponderance of the evidence that it provides nondiscriminatory access to network elements because of Qwest's reliance on UNE-Star as its unbundled network element product to the two largest CLECs in Minnesota. (Finding 97.) The record in this proceeding, according to the ALJ, shows conclusively that UNE-Star does not meet the standards for a UNE-P offering, particularly with respect to billing accuracy. The ALJ concluded that Qwest's application for Section 271 approval for Minnesota should not be approved until Qwest has demonstrated that all UNE-Star lines have been converted to UNE-P and that its billing system is capable of meeting the appropriate performance measures for wholesale billing and providing accurate daily usage files (DUF) records to allow CLECs to appropriately charge for switched access. (Conclusion 5.)

I disagree with the ALJ regarding Check List Item No. 2 and find that Qwest has fully satisfied this requirement. I depart from the ALJ on this issue because Qwest cannot force Eschelon and McLeod to move their end user customers from UNE-Star to UNE-P against these CLECs' will. Further, UNE-Star has been offered, and is currently available, to all CLECs. Further, on the issue of accurate DUF records, I find that Qwest has made a compelling argument that the manual process is no longer used. UNE-Star

DUF provisioning was converted to a mechanized process in mid-2001 and, since that time, Qwest has used the same systems and processes for providing DUF for UNE-Star that it uses for UNE-P. The ROC OSS test and Qwest performance results conclusively establish that Qwest is meeting all Section 271 standards relating to the provisioning of DUF.

CHECKLIST ITEM NO. 14 — RESALE.

Checklist Item No. 14 requires Qwest to make telecommunications services available for resale by CLECs in accordance with the requirements of Sections 251(c)(4) and 252(d)(3). The ALJ addressed this checklist item in findings 203 through 212 and conclusion 11 of his January 28, 2003 report in Docket No. P-421/CI-01-1371. The ALJ found that there were no issues regarding the availability of services for resale. However, the terms under which those services are offered are asserted to be discriminatory in a variety of ways, including billing for termination liability assessments (TLAs) and that the unfiled agreements show price and service discrimination between CLECs. The ALJ concluded that Qwest cannot demonstrate compliance with this checklist item until Qwest has completed whatever corrective actions are required by the MNPUC in the unfiled agreements case, Docket No. P-421/C-02-197, and Qwest ceases billing for TLAs or amends its billing practices to provide notice to consumers that such billing may not be appropriate.

I disagree with the ALJ regarding Checklist Item No. 14 and find that Qwest has fully satisfied this requirement. First, Qwest has resolved the TLA issues identified by the ALJ by entering into a settlement with the Minnesota Department of Commerce, and by incorporating the agreed upon TLA changes in its SGAT.

With regard to the impact of the Minnesota unfiled agreements proceeding on this checklist item, I depart from the conclusion of the ALJ. I find that the Commission's thorough handling of the unfiled agreements matter, along with the penalty provisions ordered, address any discrimination that existed.

Qwest entered in the unfiled agreements under previous management. Previous Qwest management made many promises which were not and could not be met. Ultimately, several members of Qwest's former management left the company with lots of money and questionable ethics. Qwest has now installed new management which is committed to repairing past mistakes. For example, I've seen a willingness on the part of Qwest's new present management to work with CLEC wholesale providers recognizing that there will always be tension in this tug-of-war for customers.

Qwest's prior actions have also colored the views of some wholesale customers and regulators, resulting in a backlash to that past behavior. This has also I believe, and perhaps for good reason, resulted in an extensive investigation and a number of hearings concerning the appropriate penalty which the MNPUC has imposed on the Company in the unfiled agreement case, all of which is part of the record. I agree that the unfiled agreement case has led to a fair and just penalty. However, I believe the penalty is at the outer limits of what could or should be imposed in this case.

I also support Qwest's right to due process, including the right to appeal the MNPUC's unfiled agreements decision in court. While the unfiled agreement case is not yet fully resolved, it is being addressed at the state level, and need not impede approval of Qwest's Minnesota 271 Application. Rather, approving Qwest's Minnesota 271 Application is the better course of action in serving the best interest of Qwest's customers in Minnesota at this time. I conclude on a going forward basis, that there is no information in the Minnesota 271 proceeding to base a recommendation of non-compliance with Checklist Item No 14.

SECTION 271(D)(3)(C) — THE PUBLIC INTEREST

The MNPUC conducted a proceeding to determine whether Qwest's application to receive Section 271 approval in Minnesota would be in the public interest in Docket No. P-421/CI-01-1373. From the Bell Atlantic New York Section 271 Order, I understand that the FCC views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.[1]

I also understand that the FCC has developed three criteria to make the public interest determination: 1) it considers whether granting the application is consistent with promoting competition in the local and long distance telecommunications markets, 2) it looks for assurances that the BOC would continue to satisfy the requirements of Section 271 after entering the long distance market by reviewing the BOC's performance plan, if it has one, and other available enforcement tools, and 3) it considers whether there are any remaining unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications.[2]

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[1]Bell Atlantic New York Order, paragraph 423.

[2]SWBT Kansas/Oklahoma Order, paragraphs 268, 269 and 267.

I concur with the MNPUC's collective comments regarding Track A and performance assurance matters. However, I also find additional factors demonstrating that approving Qwest's Minnesota 271 Application is consistent with promoting competition in the local and long distance markets in Minnesota. Foremost, both Minnesota wholesale and retail customers have benefitted from the competitive market as it has evolved up to this point. The record in the Minnesota 271 proceeding, and the FCCs's own reports, show that Minnesota benefits from a higher level of competition than numerous other states. I see no reason why this competitive environment would not continue after Qwest's Minnesota 271 Application has been approved.

Moreover, approving Qwest's Minnesota 271 Application will improve the level of competition and resulting customer benefits. Much of Qwest's service territory in Minnesota lies outside of the Minneapolis - St. Paul metropolitan area. National CLECs have shown little interest in competing, or making an attempt to compete, in these rural areas of Minnesota. Consequently, Qwest is the only choice of telecommunications services providers in many rural areas. Approving Qwest's Minnesota 271 Application will give rural customers access to the full array of telecommunications services, including one-stop access to local and long distance services from Qwest. This is an important step in reducing the disparity in telecommunications services and options between the metropolitan and more rural areas of Minnesota. Further, experience in other states suggests even more vigorous competition will develop after Qwest's Minnesota 271 application is approved.

The final factor in analyzing the public interest is a review of the local and long-distance markets to ensure that there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of the application at issue. In the Minnesota public interest proceeding, twelve separate arguments were raised regarding unusual circumstances and are addressed in paragraphs 57 through 76 of the ALJ's August 20, 2002 report in Docket No. P-421/CI-01-1373: unfiled agreements, UNE pricing, intrastate access charges, structural separation, Qwest retail and wireless customer service complaints, CLEC complaints, CLEC failures, Touch America, win back, termination liability assessments, feature group C signaling, and Qwest's corporate attitude. With the exception of any determinations made in the unfiled agreements docket, the ALJ, in paragraph 77 of his August 20, 2002 report in Docket No. P-421/CI-01-1373, found that there are no "unusual circumstances" that would make entry contrary to the public interest under the particular circumstances of Qwest's application. I concur.

However, I disagree with the ALJ findings and conclusions regarding the unfiled agreements case as they relate to public interest issues. With regard to the matter of the Minnesota unfiled agreements proceeding, in an Order issued November 1, 2002 in Docket No. P-421/C-02-197, the MNPUC found that Qwest knowingly and intentionally

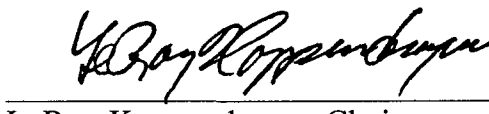
violated 47 U.S.C. §§ 252(a) and (e); that Qwest knowingly and intentionally discriminated against the other CLECs in violation of Sections 251(b)(1), 251(c)(2)(D) and 251(c)(3); and that Qwest's actions also violated state law (Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibiting discrimination in the provision of intrastate service and Minn. Stat. § 237.121, subd. 5, prohibiting the imposition of unreasonable or discriminatory restrictions on the resale of its services). On February 28, 2003, the MNPUC issued its Order Assessing Penalties in the same proceeding, which establishes three steps for Qwest to remedy its discriminatory action or pay a monetary penalty. On March 10, 2003, Qwest requested reconsideration of the MNPUC's penalty order. On April 8, 2003 and April 14, 2003, the MPUC met to reconsider its February 28, 2003 Order, making only certain limited changes and largely preserving its original decision. Therefore, matters regarding any prior discrimination are being fully and appropriately addressed at the state level.

I recognize the position that the FCC has taken on the unfiled agreements matter in the Qwest Nine State Decision in Docket 02-332. I also recognize that Section 271(d)(2)(B) only requires the FCC to consult with the state commission on the compliance of the BOC with the requirements of Section 271(c), which includes Track A or B and the competitive checklist. Nevertheless, I recommend that the FCC find that there are no remaining unusual circumstances that would make entry contrary to the public interest under the particular circumstances of Qwest's Minnesota 271 Application.

CONCLUSION

A review of the record developed in Minnesota should satisfy the FCC that record fully supports the finding that Qwest has satisfied the 14 point competitive checklist and the public interest requirements for receipt of approval of its Section 271 application for Minnesota, and for the reasons set forth above, and pursuant to its authority under Section 271(d)(2)(B), I respectfully recommend that the Federal Communications Commission approve Qwest's application to offer in-region interLATA service in the state of Minnesota.

Respectfully submitted,



LeRoy Koppendrayer, Chair
Minnesota Public Utilities Commission

ATTACHMENT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-90
for Authorization To Provide In-Region,	)	
InterLATA Services in the State of Minnesota	)	

April 17, 2003

SEPARATE COMMENTS OF COMMISSIONER PHYLLIS A. REHA REGARDING CHECKLIST ITEMS #2, #14 AND PUBLIC INTEREST ASPECTS OF QWEST'S SECTION 271 FILING

INTRODUCTION

This has been a lengthy and unprecedented process. Based on the extensive factual record developed in this case, I believe that Qwest has shown that it meets the requirements of the checklist items, except with respect to the unfiled agreements issue in Checklist No. 14. The record also shows that Qwest has not met the public interest requirements necessary for approval of its Section 271 application in Minnesota. I therefore recommend that the Federal Communications Commission deny the application of Qwest Communications International, Inc. for authority under Section 271 to provide in-region interLATA services in the state of Minnesota.

The MNPUC's general comments provide the Minnesota Commission's conclusions regarding all other aspects of Qwest's applications, except those pertaining to Checklist Items #2, and #14, and the public interest aspect. My comments here are with respect to those limited issues.

SECTION 271(C)(2)(B) — COMPETITIVE CHECKLIST ITEMS #2 AND #14

Checklist Item #2 requires that Qwest demonstrate that it is providing nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251 (c)(3) and 252(d)(1). I find that Qwest has shown evidence that it successfully addressed the problems identified in the ALJ's January 28, 2003 report in Docket No. P-421/CI-01-1371 at paragraphs 74 through 118. *See* Qwest's Minnesota Section 271 Application (Minn. App.), Appendix K, Vol. 3, Tab 317. I conclude that Qwest substantially meets the requirements of Checklist item #2.

Checklist Item #14 requires Qwest to make telecommunications services available for resale by CLECs in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3). I find that the SGAT language revision relating to termination liability arrangements proposed by the DOC and Qwest resolves the outstanding TLA issues. Regarding the impact of the Unfiled Agreements docket on Checklist #14, I agree with the ALJ that Qwest cannot be found to have met this checklist item until it has implemented the remedial measures ordered by the MNPUC in its February 28, 2003 Order in Docket No. P-421/C-02-197, as modified by the Commission's own motions in its meetings on April 8 and 14, 2003. *See In Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* Docket No. P-421/C-02-197, Findings of Fact, Conclusions, Recommendation and Memorandum of Administrative Law Judge, Minn. App., Appendix C, Tab 24 (Sept. 20, 2002); MNPUC Appendix D, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies (November 1, 2002), and Minn. App. Appendix N, Vol. 1h, Tab 255; MNPUC Appendix E, Order Assessing Penalties (February 28, 2003), and Minn. App. Appendix N, Vol. 1h, Tab 295. The MNPUC has developed a solid record of knowing and intentional violations by Qwest and of the company's actions for thwarting fair competition in Minnesota.

The Unfiled Agreements case also shows that Qwest has not corrected its price and service discrimination. I am convinced that Qwest cannot be found to have met the provisions of Checklist Item #14 until it has implemented the remedial measures ordered by the MNPUC.

SECTION 271(D)(3)(C) — THE PUBLIC INTEREST

In addition to determining whether Qwest satisfies the competitive checklist and will comply with 47 U.S.C. § 272, Congress directed the FCC to assess whether the requested authorization would be consistent with the public interest, convenience, and

necessity.[1] The public interest analysis is an independent element of the statutory checklist and requires an independent determination. The FCC has developed three criteria to use in making the public interest determination: 1) it considers whether granting the application is consistent with promoting competition in the local and long distance telecommunications markets; 2) it looks for assurances that the BOC would continue to satisfy the requirements of Section 271 after entering the long distance market by reviewing the BOC's performance plan, if it has one, and other available enforcement tools; and 3) it considers whether there are any remaining unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. In addition, the FCC has indicated its interest in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations.

I agree with the ALJ that Qwest has satisfied the first two criteria in making the public interest determination. Granting the application would be consistent with promoting competition in the local and long distance telecommunications markets; and the MNPUC has approved a Minnesota Performance Assurance Plan that, if followed, will assure anti-backsliding. However, the final factor in analyzing the public interest is a review of the local and long-distance markets to ensure that there are no "unusual circumstances" that would make entry contrary to the public interest. With respect to this third factor, the ALJ did not consider the Unfiled Agreements docket and in fact, concluded as follows:

> The Commission will not be able to determine whether Qwest meets its burden of proving that §271 approval is consistent with the public interest, convenience, and necessity, as required by section 271(d)(3)(C) until the Commission has made final decisions in the related dockets concerning the.....Unfiled Agreements.

See Minn. App., Appendix K, Vol. 5, Tab 99, Conclusion No. 3. A Contested Case Hearing was held in the Unfiled Agreements case and after consideration of a full evidentiary hearing, the MNPUC specifically found:

- That Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the company to file these agreements with the MNPUC and the company intentionally did not make the required filing.

[1] 47 U.S.C. §271(d)(3)(C)

- In each of the twelve interconnection agreements cited by the Minnesota Department of Commerce, Qwest provided terms, conditions, or rates to certain CLECs that were better than the terms, rates and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest knowingly and intentionally discriminated against the other CLECs in violation of Sections 251(b)(1), 251(c)(2)(D) and 251(c)(3).

- Qwest's actions also violated state law: Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibiting discrimination in the provision of intrastate service and Minn. Stat. § 237.121, subd. 5, prohibiting the imposition of unreasonable or discriminatory restrictions on the resale of its services.

Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, MNPUC Appendix D, and Minn. App, Appendix N, Vol. 1h, Tab 255, at 4-6.

Qwest has not agreed to the restitution ordered by the MNPUC to rectify its anti-competitive conduct. Until Qwest implements the restitution, it has not leveled the competition field and has not fully addressed my concerns related to the public interest.

There are also other instances where the MNPUC has found Qwest to have acted in an anti-competitive manner. On June 18, 2002, the MNPUC found that Qwest had acted anti-competitively and in bad faith by not meeting the terms of its interconnection agreement with AT&T and cooperating in a market entry test. A fine of $900,000 was assessed against Qwest. *See* Minn. App., MNPUC Appendix F and G, and Appendix N, Vol. 1b, Tabs 178 and 179 (MNPUC's June 18, 2002 Order Accepting and Adopting ALJ's Report With Two Modifications and June 18, 2002 Order Assessing Penalties, in *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, Docket No. P-421/C-01-391).

Qwest has appealed the matter. On July 3, 2002, the MNPUC found that Qwest had failed to properly bill for the costs of certain critical wholesale services purchased by Onvoy. *See* Minn. App., MNPUC Appendix H, and Appendix N, Vol. 1i, Tabs 62 and 71 (MNPUC's July 3, 2002 Order Resolving Complaint, Setting Collocation Prices, and Setting Procedural Schedule, and the MNPUC's December 19, 2002 Order on Reconsideration Awarding Interest, in *In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing*, Docket No. P-421/C-01-1896). On November 5, 2002, the MNPUC found that Qwest was violating its interconnection agreement with Eschelon by overcharging for high capacity connections between wire centers. *See* MNPUC Appendix I, and Minn. App., Appendix N, Vol. 1e, Tab. 12 (MNPUC's November 5, 2002 Order Resolving Complaint in *In the Matter of the*

Complaint of Eschelon Telecom of Minnesota, Inc. Against Qwest Corporation Regarding the Pricing of Unbundled Dedicated Interoffice Transport, Docket No. P-421/C-02-550). There are also other outstanding complaints against Qwest, including Desktop Media, Inc.'s complaint regarding Qwest's provisioning of unbundled local switching and dark fiber and McLeodUSA Telecom Development, Inc.'s complaint that Qwest is not paying switched access charges because it uses FG-C access. *See* MNPUC Appendix J, and Minn. App., Appendix M, Vol. 1m, Tab. 2 (MNPUC's October 28, 2002 Order Asserting Jurisdiction, Finding Reasonable Grounds to Investigate, and Deciding to Refer the Matter to Office of Administrative Hearings in *In the Matter of the Complaint of Desktop Media, Inc. Against Qwest Corporation Regarding Interconnection Terms*, Docket No. P-421/C-02-1597); and MNPUC Appendix K, and Minn. App., Appendix N, Vol. 1l, Tab 4 (MNPUC's October 14, 2002 Order Asserting Jurisdiction, Denying Request for Temporary Relief, and Referring Matter to Office of Administrative Hearings in *In the Matter of the Complaint of McLeodUSA Telecom Development, Inc. Against Qwest Corporation Regarding the Payment of Switched Access Charges*, Docket No. P-421/C-02-1439). These complaints highlight Qwest's pattern of anti-competitive behavior.

Based on Qwest's past conduct and continued behavior as reflected in the complaints received by the MNPUC and the record evidence shown in the Unfiled Agreements case, I am not convinced that the public interest is served by approving Qwest's 271 application. These circumstances signal Qwest's intent to frustrate fair competition in Minnesota.

Based on Qwest's actions in the Unfiled Agreements case and the company's failure to implement the restitution component of the MNPUC's February 8, 2003 Order, as modified at the MNPUC's meetings on April 8 and 14, 2003, I cannot recommend that Qwest's 271 application is in the public interest. I therefore find that Qwest's entry into the interLATA long distance market in Minnesota is not in the public interest at this time nor will it be until Qwest rectifies its anti-competitive actions as ordered by the MNPUC in the Unfiled Agreement proceeding.

CONCLUSION

I believe that the FCC should deny the application of Qwest for authority under Section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of Minnesota. This recommendation is based on Qwest's failure to meet the requirements of Checklist #14 and of public interest, as evidenced in the voluminous factual record developed with the active participation of numerous parties.

Respectfully submitted,

Phyllis A Reha

PHYLLIS A. REHA, Commissioner
Minnesota Public Utilities Commission

ATTACHMENT 3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-90
for Authorization To Provide In-Region,	)	
InterLATA Services in the State of Minnesota	)	

April 17, 2003

SEPARATE COMMENTS OF COMMISSIONERS GREGORY SCOTT AND R. MARSHALL JOHNSON REGARDING CHECKLIST ITEMS #2, #14, AND PUBLIC INTEREST ASPECTS OF QWEST'S SECTION 271 FILING

INTRODUCTION

We recommend that the Federal Communications Commission (Commission) deny the application of Qwest Communications International, Inc. (Qwest) for authority under Section 271 of the Telecommunications Act of 1996 (the Act) to provide in-region interLATA services in the state of Minnesota. Our recommendation is not made lightly and is the result of the lengthy process of developing the factual record in Minnesota with the active participation of numerous parties over several months.

A review of the record developed in Minnesota should satisfy the Commission that the MNPUC has fully performed its investigative and review functions under the Act. Our determination that Qwest has failed to meet its burden of proving compliance with Section 271 is based upon a well developed and robust record. Unlike in other states where commissions did not or could not find Qwest's conduct in violation of the public interest, the Minnesota record fully supports a finding that Qwest has not satisfied

checklist items 2 and 14 nor met the public interest requirements necessary for approval of its § 271 application for Minnesota. We discuss each of these below.

SECTION 271(C)(2)(B) - COMPETITIVE CHECKLIST ITEMS #2 AND # 14.

CHECKLIST ITEM NO. 2 - UNBUNDLED NETWORK ELEMENTS (UNES).

Checklist Item No. 2 requires that Qwest demonstrate that it is providing nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1). Issues regarding Qwest's compliance with this checklist item were addressed in the ALJ's January 28, 2003 report in Docket No. P-421/CI-01-1371. *See* Qwest's Minnesota Section 271 Application (Minn. App.), Appendix K, Vol. 3, Tab 317, ¶¶ 74-118, 302-324, and Conclusion of Law No. 5 at p. 104. The ALJ found that Qwest has not demonstrated by a preponderance of the evidence that it provides nondiscriminatory access to network elements because of Qwest's reliance on UNE-Star as its unbundled network element product to the two largest CLECs in Minnesota. *Id.* at ¶ 97. The record in this proceeding, according to the ALJ, shows conclusively that UNE-Star does not meet the standards for a UNE-P offering, particularly with respect to billing accuracy. The ALJ concluded that Qwest's application for Sec. 271 approval for Minnesota should not be approved until Qwest has demonstrated that all UNE-Star lines have been converted to UNE-P and that its billing system is capable of meeting the appropriate performance measures for wholesale billing and providing accurate daily usage files (DUF) records to allow CLECs to appropriately charge for switched access. *Id.* at 104, Conclusion of Law No. 5.

We have a long history in Minnesota regulation of relying on ALJs to develop factual records. In this case, the ALJ heard the witnesses directly, ruled on evidentiary objections, and reviewed and analyzed the FCC's decision in Qwest's nine state application. We heard nothing substantive from Qwest or any other party that causes us to disregard the ALJ's well-considered decision. Further, in order to demonstrate that its billing system is performing at an adequate level, Qwest should be required to modify the billing accuracy PID, BI-3A, to reflect the percent of the CLEC bill in error instead of the total dollar adjustment. The PID should also account for the adjustment in the month when the CLEC was billed. (The current PID allows Qwest to hide many months of errors by making one adjustment in a single month.) The results that are reviewed in Qwest's application should also be the four most recent months, should contain aggregate results as well as CLEC specific results by type of service, and the aggregate and CLEC specific results should be compared to make certain they are consistent. The DUF should also be audited (at Qwest's expense), using two or three months of recent data, to assure the accuracy of the DUF before Qwest receives § 271 approval. Finally, a billing PID to reflect completeness of daily usage files should also be developed and implemented, with

Qwest passing, before receiving § 271 approval for Minnesota. Qwest has not shown by the preponderance of evidence that its billing accuracy in Minnesota is sufficient to support a finding of compliance with checklist item No. 2. *See* MNPUC Appendix L, transcript excerpts from March 5, 2003

CHECKLIST ITEM NO. 14 – RESALE.

Checklist Item No. 14 requires Qwest to make telecommunications services available for resale by CLECs in accordance with the requirements of 47 U.S.C. §§ 251(c)(4) and 252(d)(3). The ALJ addressed this checklist item in his January 28, 2003 report in Docket No. P-421/CI-01-1371. *See* Minn. App., Appendix K, Vol. 3, Tab 317, ¶¶ 203-12, and Conclusion of Law no. 11. The ALJ found that there were no issues regarding the availability of services for resale. However, the terms under which those services are offered are asserted to be discriminatory in a variety of ways, including billing for termination liability assessments (TLAs) and that the unfiled agreements show price and service discrimination among CLECs. The ALJ concluded that Qwest cannot demonstrate compliance with this checklist item until Qwest has completed whatever corrective actions are required by the MNPUC in the MNPUC Docket No. P-421/C-02-197, the Minnesota Department of Commerce complaint against Qwest concerning unfiled agreements ("Unfiled Agreements" docket), and Qwest ceases billing for TLAs or amends its billing practices to provide notice to consumers that such billing may not be appropriate. *Id.* at p. 105.

In response to the ALJ's finding, Qwest and the DOC have agreed to revised language for Qwest's SGAT regarding Qwest's billing practices for a customer that early terminates Qwest service to receive service from a CLEC offering services via resale of Qwest services. We agree that this language resolves the outstanding TLA issues raised by the ALJ.

With regard to the impact of the Minnesota unfiled agreements proceeding on this checklist item, we agree with the ALJ. Qwest cannot be found to have met this checklist item until it has implemented the provisions ordered by the MNPUC in its February 28, 2003 Order Assessing Penalties in Docket No. P-421/C-02-197 as subsequently modified. *See* MNPUC Appendix E, and Minn. App., Appendix N, Vol. 1h, Tab 295. On March 10, 2003, Qwest requested reconsideration of that MNPUC Order. *See* Minn. App., Appendix N, Vol. 1h, Tab 296. As such, we cannot recommend approval of Qwest's compliance with checklist item No. 14.

SECTION 271(D)(3)(C) — THE PUBLIC INTEREST

Qwest attempted to cheat its way to 271 approval. If the FCC approves Qwest's application for Minnesota, Qwest will have succeeded. If the public interest standard is to have any meaning or effect, it must be applied to prevent Qwest's entry into long distance in Minnesota. If lying, cheating, and purposeful deception are not "unusual circumstances that would make entry contrary to the public interest," then the public interest standard is a sham.

Qwest's conduct, both leading up to and subsequent to the matter of the Minnesota Unfiled Agreements docket, prevents us from recommending that Qwest's Sec. 271 application for Minnesota is in the public interest. In that proceeding, the MNPUC, in its November 1, 2002 Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies in Docket No. P-421/C-02-197, specifically found:

- That Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because
  Qwest knew that the referenced statutes required the company to file these agreements with the MNPUC and the company intentionally did not make the required filing.

- In each of the twelve interconnection agreements cited by the Minnesota Department of Commerce, Qwest provided terms, conditions, or rates to certain CLECs that were better than the terms, rates and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest knowingly and intentionally discriminated against the other CLECs in violation of Sections 251(b)(1), 251(c)(2)(D) and 251(c)(3).

- Qwest's actions also violated state law: Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibiting discrimination in the provision of intrastate service and Minn. Stat. § 237.121, subd. 5, prohibiting the imposition of unreasonable or discriminatory restrictions on the resale of its services.

See MNPUC Appendix D; and Minn. App., Appendix N, Vol. 1h, Tab 295.

Following two reconsideration hearings, the MNPUC ordered relief intending to level the playing field that Qwest's conduct purposely distorted and punishing Qwest for its intentional, knowing conduct.[2] To level the playing field, the MNPUC ordered Qwest to provide the same discounts provided to Eschelon and McLeod to all competitors purchasing services from Qwest during the period November 15, 2000 to May 15, 2002. Even though Qwest had provided discounts to Eschelon on both inter-state and intra-state access, the MNPUC only ordered Qwest to provide discounts to competitors on intra-state access. The intention of this relief was to give competitors the benefit of that which Qwest secretly gave only to Eschelon and McLeod. As a punishment, the MNPUC ordered Qwest to pay a fine of $25,955,000. Minnesota has a statute permitting the MNPUC to levy fines, subject to factual findings complying with the statutory factors. *See* Minn. Stat. § 237.462, subd. 2 (2000).

Qwest's past behavior and continued actions make clear that the company is not committed to opening its local telecommunications markets to competition. The record in the unfiled agreements proceeding in Minnesota demonstrates that Qwest knowingly chose to act in an anti-competitive manner, for the specific purpose of buying the Section 271 silence of the two largest CLECs in Minnesota.[3] Qwest has also refused to acknowledge any wrong-doing and has not implemented the relief ordered by the MNPUC.

The FCC must not shrug this conduct off as past conduct being dealt with in another docket. Qwest purposely cheated for the direct and specific purpose of obtaining 271 approval. If Qwest had acknowledged its wrong-doing and implemented the relief ordered by MNPUC, then regulators could say that the bad conduct had been acknowledged and remedied, thereby relegating it to the past. None of this has happened. Qwest has NEVER acknowledged any wrong-doing. To the contrary, Qwest continues to claim that it did nothing wrong; that it was "confused" about what did and did not need to be filed. Qwest pursued this defense even though there wasn't a shred of documentary evidence or witness testimony supporting it. Counsel for Qwest acknowledged the absence of any supporting evidence in the record. *See* MNPUC Appendix M, Transcript of the MNPUC's meeting regarding Unfiled Agreements dated October 21, 2002, p. 11; and Minn. App., Appendix N, Vol. 1h, Tab 254 (full transcript).

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[2] The MNPUC's order reflecting its modifications to the initial penalty decision from the April 8 and 14, 2003 Public Meetings is unissued as of the date these comments are filed.

[3] Minn. App., Appendix N, Vol 1h includes most of the voluminous record for Docket No. P421/C-02-197. It does not include all comments, decisions and transcripts from MNPUC meetings that quite extensively address the penalty phase of this proceeding.

Qwest reasserted its baseless defense recently in response to the Arizona commission's staff suggested relief in the Arizona secret deals docket. *See* MNPUC Appendix N (TR Daily article dated March 18, 2003). Qwest has also failed to implement the remedy ordered by the MNPUC. A denial of wrong-doing, combined with Qwest's failure to implement the ordered remedy, makes Qwest's conduct very much in the PRESENT, not the past. This behavior is clear evidence that Qwest is not yet committed to opening its markets to competition. An unrepentant cheater is not entitled to wear the cloak of approval that comes with 271 entry. This is not the behavior that 271 entry is designed to reward.

Finally, the ALJ in his Finding of Fact, Conclusion, Recommendation and Memorandum dated September 20, 2002 (Report) in the Unfiled Agreements proceeding questioned the respect that one of Qwest's Executives, Audrey McKenney, Senior Vice President-Wholesale Markets Regulatory, had for the regulatory process. In paragraph 336 of the Report the ALJ concluded that:

> The testimony of Audrey McKenney that Qwest did not enter into a discount agreement with McLeod is not credible. Ms. McKenney would not directly answer questions from the Department or the Court asking whether Qwest had ever offered McLeodUSA a discount. In addition, the substantial majority of the documents in evidence were created contemporaneously with the events at issue and directly contradicts Ms. McKenney's testimony. Finally, Ms. McKenney offered Eschelon financial incentives to (a) withhold information from regulator that may be relevant to Qwest's Section 271 applications, and (b) covertly assist Qwest in manipulating various regulatory proceedings. There is a real question about her respect for the regulatory process. (Footnotes omitted.)

See Minn. App., Appendix C, Vol. 2, Tab 24.

These facts in combination with those identified above and those to be identified below provide damning evidence regarding Qwest's failure to meet the Commission's public interest test. As such, we cannot recommend approval of Qwest application for Section 271 authority to provide interLATA services in Minnesota.

The unfiled agreements docket is also not the first time that the MNPUC has found Qwest to have acted in an anti-competitive manner. On June 18, 2002, the MNPUC found that Qwest had acted anti-competitively and in bad faith by not meeting the terms of its interconnection agreement with AT&T and cooperating in a market entry test. A fine of $900,000 was assessed against Qwest. *See* MNPUC Appendix G and Minn. App., Appendix N, Vol. 1b, Tabs 178 and 179 (MNPUC's June 18, 2002 Order Accepting and Adopting ALJ's Report With Two Modifications and June 18, 2002 Order Assessing

Penalties, in *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, Docket No. P-421/C-01-391). Qwest has appealed the matter. On July 3, 2002, the MNPUC found that Qwest had failed to properly bill for the costs of certain critical wholesale services purchased by Onvoy. *See* MNPUC Appendix H and Minn. App., Appendix N, Vol. 1i, Tabs 62 and 71 (MNPUC's July 3, 2002 Order Resolving Complaint, Setting Collocation Prices, and Setting Procedural Schedule, and the MNPUC's December 19, 2002 Order on Reconsideration Awarding Interest, in *In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing*, Docket No. P-421/C-01-1896). On November 5, 2002, the MNPUC found that Qwest was violating its interconnection agreement with Eschelon by overcharging for high capacity connections between wire centers. *See* MNPUC Appendix I and Minn. App., Appendix N, Vol. 1e, Tab. 12 (MNPUC's November 5, 2002 Order Resolving Complaint in *In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc. Against Qwest Corporation Regarding the Pricing of Unbundled Dedicated Interoffice Transport*, Docket No. P-421/C-02-550).

There are also other outstanding complaints against Qwest, including Desktop Media, Inc.'s complaint regarding Qwest's provisioning of unbundled local switching and dark fiber and McLeodUSA Telecom Development, Inc.'s complaint that Qwest is not paying switched access charges because it uses FG-C access. *See* MNPUC Appendix J and Appendix K, and Minn. App., Appendix M, Vol. 1m, Tab. 2 (MNPUC's October 28, 2002 Order Asserting Jurisdiction, Finding Reasonable Grounds to Investigate, and Deciding to Refer the Matter to Office of Administrative Hearings in *In the Matter of the Complaint of Desktop Media, Inc. Against Qwest Corporation Regarding Interconnection Terms*, Docket No. P-421/C-02-1597); and Minn. App., Appendix N, Vol. 1l, Tab 4 (MNPUC's October 14, 2002 Order Asserting Jurisdiction, Denying Request for Temporary Relief, and Referring Matter to Office of Administrative Hearings in *In the Matter of the Complaint of McLeodUSA Telecom Development, Inc. Against Qwest Corporation Regarding the Payment of Switched Access Charges*, Docket No. P-421/C-02-1439). These complaints highlight Qwest's pattern of anti-competitive behavior.

CONCLUSION

The carrot of § 271 approval must be about more than wooden compliance with a check-list. The real test of the openness of a market has nothing to do with computer systems or percentages of access lines lost. The real test is about attitude, about behavior and how that behavior translates into conduct. For all we know, but for Qwest's

behavior, Minnesota would have a much more robust market. For the reasons set forth above, and pursuant to our authority under 47 U.S.C. § 271(d)(2)(B), we respectfully recommend that the Federal Communications Commission deny Qwest's application to offer in-region interLATA service in the state of Minnesota at this time.

Respectfully submitted,

Gregory Scott, Commissioner
Minnesota Public Utilities Commission

R. Marshall Johnson, Commissioner
Minnesota Public Utilities Commission

AG: #817596-v1

APPENDIX

INDEX TO APPENDIX

APPENDIX A

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As I noted I've handed out a list of -- for your consideration, and the item numbers on those correspond to your staff matrix. The first issue that we identified was in staff item 4, pricing. In the generic cost docket this commission determined that there should be no separate charge for extension technology. The commission established a rate of zero, which is established in the SGAT Section 9.2.3 for prices. Qwest witness, Mr. Easton, testified that Qwest would not charge for extension technology; and yet Qwest's SGAT description of this service in 9.2.2.5 states that if Qwest determines that extension technology is not required but the CLEC requests the service anyway, Qwest would charge for extension technology.

We're quest -- We're requesting a correction of the SGAT description to reflect the rate determination, and staff agrees that this change should be made in the SGAT.

Second --

CHAIR KOPPENDRAYER: So the change you're recommending then is your language basically saying that Qwest will provide requested technology and will charge CLECs if it's not required?

MR. BRADLEY: Yeah, we would remove the

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language that is currently found in 9.2.2.5, we would remove "if extension technology is requested by the CLEC but is not required to meet technical standards, then Qwest will provide the requested extension technology and will charge CLEC." We would remove the "charge CLEC" language here.

CHAIR KOPPENDRAYER: It was -- It was my understanding though that it was all required. You're actually meeting them halfway or something.

MR. BRADLEY: No. The -- You've -- This commission has ordered that it's all required.

CHAIR KOPPENDRAYER: Yes.

MR. BRADLEY: That it should be free.

CHAIR KOPPENDRAYER: Yes.

MR. BRADLEY: The SGAT says there would be a charge.

CHAIR KOPPENDRAYER: Yes.

MR. BRADLEY: I'm removing the language that says there will be a charge. I'm making -- trying to make the SGAT comply with your order.

CHAIR KOPPENDRAYER: Okay. So then how do you come up with technology that that's where the --

MR. BRADLEY: We're just removing this one sentence from within 9.2.2.5. The rest of

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9.2.2.5 provides for delivery of the technology, and the rate provided in the rate section it says in 9.2.3 it's free. So we're making the SGAT internally consistent with the rates charged and with this commission's prior order.

CHAIR KOPPENDRAYER: Okay. I'll quit pursuing it. But your last three words says that Qwest will charge the CLEC.

MR. BRADLEY: That's the language I'm seeking to remove.

CHAIR KOPPENDRAYER: Oh.

MR. BRADLEY: If you look above there, remove --

CHAIR KOPPENDRAYER: I thought you were adding that language.

MR. BRADLEY: No. It says remove --

CHAIR KOPPENDRAYER: Now we're straight.

MR. BRADLEY: -- the following language. You are absolutely correct, Chair --

CHAIR KOPPENDRAYER: Thank you.

MR. BRADLEY: -- Koppendrayer. You're absolutely correct. I'm seeking to remove it.

COMMISSIONER JOHNSON: Should we take Qwest's side on this right now and go through each one?

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MR. BRADLEY: That's your choice.

COMMISSIONER JOHNSON: Mr. Chair, do you think or do you want --

CHAIR KOPPENDRAYER: Commissioner Johnson.

COMMISSIONER JOHNSON: I was wondering if we should listen to Qwest now and solve this one and --

CHAIR KOPPENDRAYER: Do you want to hear a response to each one as we go?

COMMISSIONER JOHNSON: Well, that's my suggestion. But I'm open.

CHAIR KOPPENDRAYER: Well, that's okay. Then we don't have to go back and forth.

COMMISSIONER JOHNSON: Yeah.

MR. CATTANACH: Chairman Koppendrayer --

COMMISSIONER JOHNSON: While it's fresh in our minds.

MR. CATTANACH: -- Members of the Commission, this one could be pretty easy. We're okay with this change.

COMMISSIONER JOHNSON: You're okay? Thank you.

CHAIR KOPPENDRAYER: You weren't identified for our record before. So maybe you

APPENDIX B

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MR. WEIGLER: I guess I could have made it a lot easier, if that was your question. I apologize.

CHAIR KOPPENDRAYER: I was trying to make it easy for you.

MR. WEIGLER: I never get the bait.

Item number 11 relates -- again says that the ALJ accepted Qwest's SGAT language for this issue. This involves the mechanized loop qualification testing, the MLT testing. And what the issue on this MLT testing is Qwest gets certain information on when they test a loop, and their information goes to their -- if the retail folks request the testing, they get all kinds of information. And what the ALJ had to determine was whether it would be parity if the CLECs got that information. And this is found in paragraph 180 of the ALJ's orders. And the administrative law judge said he agrees with the FCC that it's not necessary to require additional testing in order to demonstrate checklist compliance given that Qwest generally has demonstrated the adequacy of the RLDT and the loop qualification tool. Those are what's used to test. However, once Qwest does do the testing and creates information at the provisioning

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stage, it should be obligated to share those results if the CLECs ask for them.

Qwest has interpret -- taken that and provided extremely limited language on what exactly the CLECs get. And it's Section 9.2.2.8.7 where Qwest says that they would only provide CLECs the results that exist in the WFA -- that's W-F-A -- database of any mechanized loop test Qwest may have previously conducted in provisioning the unbundled loop.

First of all, the ALJ made a finding that there's more results that's what -- than are what's in WFA. If you look at -- Strike that. There are more results than what's in WFA. In fact, Qwest has made an admission to that fact.

COMMISSIONER SCOTT: What's WFA?

MR. WEIGLER: WFA is a database that holds information on mechanized loops.

COMMISSIONER SCOTT: Sure, it is. What other databases do that?

MR. WEIGLER: What -- What other Qwest databases do that?

COMMISSIONER SCOTT: Yeah. Where else would it be so that you can say WFA is not the --

MR. WEIGLER: Well, that --

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COMMISSIONER SCOTT: -- universe of this?

MR. WEIGLER: Mr. Chair, Commissioner Scott, if you look at Exhibit E, which is a letter to Marlene Dortch, secretary of the Federal Communications Commission, from Steven Davis --

CHAIR KOPPENDRAYER: What page?

MR. WEIGLER: It's on page 4. I was hoping to find my red-lined copy, but I think I handed that out to somebody. It says, Information from the MLT is cut -- we're on the first full paragraph --

COMMISSIONER SCOTT: Yep.

MR. WEIGLER: -- one, two, three, four sentences down, in the middle of the sentence. It says, Instead, information from the MLT is cut from the coordinator's screen and pasted into the remarks section of Qwest's work force administrator, WFA, system. In addition, a hard copy of the CLEC MLT results is maintained with other test results for that unbundled loop conversion in a file at the QCCC. This is a part of QCCC's processes for maintaining all documentation associated with each coordinated cut that it performs.

And, Chairperson Koppendrayer, Commissioner Scott, I think we've hit the crux of

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this. We only get what's in the WFA, and we only get previous tests. Everyone -- Qwest gets the hard copy of the CLECs' MLT results as well as other test results for that particular loop. That's what we want to see. And so that's equality. That's parity. And that's what --

COMMISSIONER SCOTT: Can I ask why this has to be hard? Why does that particular issue have to be --

MR. WEIGLER: Because --

COMMISSIONER SCOTT: -- difficult?

MR. WEIGLER: Because Qwest won't agree to it.

COMMISSIONER SCOTT: Yeah. Why though?

MR. CRAIN: I -- I -- For the life of me when I go through this process, I don't know why this issue has been as hard as it is. We will provide CLECs with all the results of the MLT tests that exists. The issue is that after we run these MLT tests, most of the information just goes away. It's not maintained anywhere. We have found that while we did keep those files for a time, we don't do that anymore; that there is only this information that is now populated in the WFA database. There are no other files that are maintained with the

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results of these tests.
We could change this language somehow to reflect the fact that if the -- if the results of this information exist within Qwest's systems, databases, or records, we'll provide it to the CLECs. We just wanted to make clear that most of the results of these tests pop up on somebody's screen when they run them. And, by the way, to clarify this, these are tests that we run for the CLECs while we're provisioning their loops. This is done on behalf of the CLEC. Most of the results of the tests, when it comes up to our technician -- not a retail person, our technician -- once they look at them, they take and cut and paste certain pieces of that information and put it in the WFA database. Once that's done, the screen goes away. You can't go back and retrieve that information anymore. Anything we can go back and retrieve, anything that exists in our systems with the results of these tests we'll provide to the CLECs. That's what we meant to say in this language.
COMMISSIONER SCOTT: Mr. Weigler, you want to see more than what Mr. Crain just said?
MR. WEIGLER: I would ask Mr. Crain to look at our Exhibit F, which is 9.2.2.8.7, annotated

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to comply completely with the -- or is aligned completely with what the ALJ ordered. And it sounds like what Mr. Crain would do.
COMMISSIONER SCOTT: Sure does.
MR. WEIGLER: So if Mr. Crain would agree to this language which AT&T proffered previously, we'd -- we'd be glad to resolve this issue, and I don't think there's an issue for the FCC.
COMMISSIONER SCOTT: Mr. Crain, it goes beyond WFA, what you said you'd do; and it's limited to hard copy results, which you said you'd like it to be limited to.
MR. CRAIN: I need to check. I think we're fine with the -- I would -- I would suggest that we -- I have a couple of concerns with this language. For example, the last couple of lines I need to verify whether or not that's okay. This is something that's a new request and doesn't relate to the issue at hand, the final two sentences that suggest -- that AT&T is suggested -- suggesting adding. And then I would be okay with the rest of the language, except for the fact that I would just readd -- AT&T took out "that exist in the WFA database." I would change that to read "that exist in Qwest's systems or records."

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CHAIR KOPPENDRAYER: Hence, both data base and hard copy.
MR. CRAIN: Yeah. And then take out the final two sentences. With that I think we address what we're talking about here, and I think it addresses AT&T's concerns.
CHAIR KOPPENDRAYER: Mr. Weigler.
MR. WEIGLER: Chair Koppendrayer, Members of the Commission, it -- that language is fine for 271 purposes, because I'm very sensitive to the issue that the commission's only looking at what the ALJ did. As far as resolving our other issues, we're going to have to bring that up in the SGAT docket or wherever appropriate. But as far as these issues for 271 purposes, that's fine.
CHAIR KOPPENDRAYER: Thank you.
COMMISSIONER SCOTT: Is this a deal then or not? Do you need to do something with the last two sentences?
MR. CRAIN: We -- Next time we amend the SGAT, we'll include that language within the SGAT. Oh, with the last two sentences I think the issue was that we didn't agree to add those and that AT&T said that they're going to take those and bring it to the SGAT docket or somewhere else.

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MR. WEIGLER: We're either going to have to arbitrate it -- I just don't want to give up our rights to do so just be -- because we're talking about a narrow issue here, whether they've complied with the ALJ's orders. And this issue didn't come up in the ALJ's --
MR. CRAIN: I think --
MR. WEIGLER: -- order.
MR. CRAIN: I think we have a deal in terms of 271, and we will amend this -- we commit to amending this language next time we update the SGAT to incorporate the changes we discussed for the first part of this. AT&T will take the second -- the last two sentences and bring that up either in an arbitration or the SGAT docket or wherever else appropriate.
CHAIR KOPPENDRAYER: Good. Mr. Weigler, if you bring it up before the FCC, I'm not responsible for what he does to you. Okay? Come back here. That's it --
MR. WEIGLER: I'll do it at my peril.
CHAIR KOPPENDRAYER: That's it for you?
MR. WEIGLER: Yeah. That is the two issues on this particular subset.
CHAIR KOPPENDRAYER: Thank you. Does

APPENDIX C

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extent that Qwest determines that there is something other than this for which it wants to create a new rate, it obviously doesn't have one now; it should follow that process. I don't think you need any special order to do that.

CHAIR KOPPENDRAYER: Ms. Peirce, then this makes this discussion a nonissue at this point.

MS. PEIRCE: I think it probably does.

CHAIR KOPPENDRAYER: Thank you.

COMMISSIONER REHA: So we don't have to brief it. Basically just follow the process that we have in place for any new service; correct? Okay.

COMMISSIONER JOHNSON: Sounds good.

CHAIR KOPPENDRAYER: Before you send a bill, send a brief.

COMMISSIONER JOHNSON: You're getting pretty good.

COMMISSIONER SCOTT: It's the lawyer's motto.

CHAIR KOPPENDRAYER: Who is next? That's it? Now what do we do?

COMMISSIONER JOHNSON: I bet you Mr. -- Commissioner Scott has a motion. Do you? You've been taking notes all through this.

CHAIR KOPPENDRAYER: Well, tell me at

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this point do any of you parties think you need a formal motion on what we just went through or are these agreements and statements that we made part of the record and can remain as that and we can use them for our purpose for comment on 271 whether we want to or not; and when -- those issues that were in dispute will be resolved as they were delineated in the agreements, which are also part of the record; therefore, on these issues in front of us there really isn't a formal motion necessary?

Mr. Crain.

MR. CRAIN: From Qwest's standpoint we don't see any reason or need for any kind of motion or comments. I think the record states -- stands for itself, and we'll certainly -- the record will be there in the future for everybody to rely on.

CHAIR KOPPENDRAYER: And when it's to anyone's advantage, they will bring it up. We can trust that will happen.

COMMISSIONER JOHNSON: Mr. Bradley.

MR. BRADLEY: I'm satisfied with that process.

COMMISSIONER JOHNSON: Are you?

COMMISSIONER SCOTT: What about issue 14 in the MPAP language, Section 18.6.1, was there an

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agreement on this that nobody's bringing it up?

MR. WEIGLER: I have -- And I have a question. I thought we were going through -- excuse me --

CHAIR KOPPENDRAYER: Mr. Weigler.

MR. WEIGLER: -- Chair Koppendrayer, Commissioner Scott, I thought we were going through 2A and then we were going to go through 2B and 2C. So I was just directing my comments to 2A. Now I do have issues on 2B.

CHAIR KOPPENDRAYER: I was all the way from 1 through 19 already.

MR. WEIGLER: Oh, I'm looking at the telecommunications agenda where there's 2A through E. 2A is consideration of SGAT compliance issues for 271 purposes, and that's what this --

COMMISSIONER SCOTT: Oh.

MR. WEIGLER: -- graph related to.

COMMISSIONER SCOTT: I see. So you're saying that what I just asked about under 14 is 2B?

MR. WEIGLER: 2B.

COMMISSIONER REHA: I think we've -- we've -- we've finished on the matrix that we have items 1 through 13, as I understand it. And I assumed, Chair, that you were asking if anybody

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needed a motion on those 13 items or was it understood the changes that Qwest had agreed to make and what -- the other agreements that we had reached in our discussion.

CHAIR KOPPENDRAYER: And now we're up to issue 14?

COMMISSIONER REHA: Now we're up to issue 14.

CHAIR KOPPENDRAYER: And who wishes to comment?

Ms. Zeller.

MS. ZELLER: Thank you, Mr. Chair and Commissioners. This is the MPAP compliance item. And I think this is -- can be a real quick one. As you recall the commission has had a full proceeding on the MPAP. The commission did it right. You had a full opportunity for comments. You had --

CHAIR KOPPENDRAYER: Is that the November 26 order?

MS. ZELLER: That's correct. You had a hearing. You had reconsideration. You had an opportunity for appeal, and no one did take that opportunity. Now it's time for the compliance filing. And at this time Qwest has put in a compliance filing which does not comply with the

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commission's November 26th order. So I would be happy to -- And I would be more than happy to go into the merits of that, but I think --

CHAIR KOPPENDRAYER: Maybe we should find out whether Qwest wishes to retract the language and comply with the November 26th order.

Mr. Topp.

MR. TOPP: Yes. Chair Koppendrayer and Members of the Commission, there are -- out of the November 26th order we made a compliance filing. We have suggested two additional paragraphs that we would like the commission to consider. We also made some other minor modifications based on experience which has -- have been noncontroversial. But there are two provisions that we have put forth and would like the commission to consider whether they would accept those or not.

And the first is Section 18.6.1 which we have proposed and I believe is issue 14 on your chart.

CHAIR KOPPENDRAYER: Where it says either party?

MR. TOPP: And essentially what we have done here is the way that Section 18.6 is written as ordered by the commission and we have kept it as

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ordered by the commission, we are very concerned that there might be some conclusion reached that Qwest has contractually agreed to waive any objection that the commission -- that it might have to any modifications the commission made to the MPAP in the future. And it's -- 18.6 could be read in that fashion. We want to make absolutely clear that it's not. If the commission does not intend to preclude Qwest from having the ability to challenge modifications, we submit that this language is appropriate. If the commission is attempting to preclude Qwest from having the ability to challenge, then we would have serious concerns with that piece of the order as well. So we have asked that this language be submitted.

COMMISSIONER REHA: It certainly wasn't my intent, Mr. Chair, that they wouldn't have their right to object to changes we might make in the future.

CHAIR KOPPENDRAYER: Ms. Zeller, do you have a concern with that?

MS. ZELLER: I do. Qwest put in very similar language when this matter came before you before. It was fully considered, argued by the parties. The commission determined that you did not

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want to accept this language, which within the four corners of the document basically calls into question the commission's ability to make any change to this document without that change being subject to immediate appeal. You determined that you did not want to include this language. You put in approximately five pages of wording in your order rejecting the language. It could not be more crystal clear.

The commission did not agree with constraining your ability to change the MPAP. This is -- As you noted at the time of the hearing, this is a brand new regime. You didn't want to be precluded from making necessary changes without any change you make being subject to appeal based upon the provisions of the document itself.

So you made that order, you put the order in, and it's gone through reconsideration. As I say, there was no appeal. It's simply time to go ahead with your order document, and that should be the PAP that the commission is resting its recommendation on if it makes a recommendation with regard to 271.

CHAIR KOPPENDRAYER: Well, Ms. Zeller, I -- the other day I asked about a similar situation,

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and my question was and is now: Does the commission have the authority to deny a due process to a party?

MS. ZELLER: I would say that the commission does not --

CHAIR KOPPENDRAYER: And due process is the right to appeal.

MS. ZELLER: I think that the commission by this language is saying -- as I said, within the four corners of this document you're saying you just don't have a right to make changes. I don't think that's the same thing as saying that Qwest or another party has due process rights. It has rights under the Administrative Procedure Act. You couldn't, for instance, initiate a penalty that, you know, set the death penalty. I mean, you can't do that. But you can make changes within this document. And this language calls that into -- It makes it very unclear --

CHAIR KOPPENDRAYER: But --

MS. ZELLER: -- you have that ability to make changes at all.

CHAIR KOPPENDRAYER: Well, I just heard them say we have the ability to make changes, but they have the right to appeal.

COMMISSIONER REHA: Yeah, I -- my

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understanding --
CHAIR KOPPENDRAYER: Commissioner Reha.
COMMISSIONER REHA: -- you know, I don't think that they can tell us that we can't make changes that we see fit. That's part of our --
CHAIR KOPPENDRAYER: Right.
COMMISSIONER REHA: -- responsibility as a commission. But I think anyone would be able to use whatever kill rights are available to it under the Administrative Procedure Act or constitutional due process or whatever. So, you know, I don't know if this language -- what -- I haven't studied this language enough with that in mind to be able to determine whether this is appropriate language that Qwest has suggested. But my thought was we didn't want to be restricted from making any changes, and that's what we were primarily concerned with.
MS. ZELLER: And -- And this is the same -- basically the same language as you considered before in which you said it did constrain your ability to make changes.
COMMISSIONER REHA: Well, we don't want language to constrain our ability to make changes.
MS. ZELLER: And that is what you did determine this language did do, and you rejected the

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language previously.
MR. AHLERS: Mr. Chairman.
CHAIR KOPPENDRAYER: Mr. Weigler.
MR. WEIGLER: Thank you, Mr. Chair, Commissioners. I think Commissioner Reha said that she hadn't had an opportunity to review carefully the Qwest language. But if you do review carefully the Qwest language, it completely inhibits your ability to make any type of change. Let's walk through it. Nothing in this PAP precludes the commission from modifying the PAP based on its independent state law authority subject to judicial challenge. Subject to is a very strict interpretation in the fact that if I said I was going to pay -- I will pay you the $5,000 I owe you subject to me getting paid. That means that ain't happening until I get paid. And so every time that this commission wants to take -- make any kind of change to the MPAP, it's subject to judicial challenge. That means judicial challenge has to take place.
And also it says it precludes the commission from modifying the MPAP based -- and you have to have your own independent state law authority. That's opposed to the state law -- to

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state law and FCC authority. And the orders are clear -- and you walked through this in your 271 order. The FCC's been clear that the law is not only created by state law -- the law to create an MPAP is not only created by state law but by 271 and FCC law. And so that -- that first sentence takes that all away.
I also look at nothing in 18.6 says that Qwest doesn't have the right to judicial challenge. Read the language that 18.6 has already. It gives you certain rights to change -- You can order changes if the MPAP is not in the public interest. You can add topics and criteria to the six-month review and hear any disputes involving the six-month review. It doesn't say that you can go out and create a whole new penalty scheme or anything along those lines. You're restricted by the Administrative Procedures Act. You're restricted by Minnesota law. And obviously if you go outside Minnesota law, you're going to be restricted.
The third and last thing is this language that we copied out of 18.6 is directly from the North Dakota plan. It's there in the North Dakota plan. And North Dakota Qwest quotes it, I would say, out of context; but they say that a

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commissioner said of course you have the right to appeal. Well, of course they have the right to appeal here. No one said they don't. But they don't -- they don't have the right to take away your authority with an additional paragraph.
Then you look at the other -- some other states, and some other states have equally compelling language. And what Qwest did is they went through and found a state that accepted that kind of language. Well, if they want to -- If that state wants to accept it, it's fine. But other states have been very firm on this. Look at the Nebraska language. Look at the Arizona language. These are all in our briefs, and we all briefed this before, and you already decided this issue.
COMMISSIONER REHA: Yeah, I -- To me the language that -- If I might, Mr. Chair.
CHAIR KOPPENDRAYER: Please.
COMMISSIONER REHA: The language that's proposed, to the extent that it restricts us, I don't think it should properly restrict us. It seems to me that we should be able to come up with some language that would not restrict our ability to change the MPAP without having to face judicial review. Certainly they -- I -- But we need to make

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it clear that we're not restricting Qwest from -- from instituting whatever due process rights that they have under existing statute or rule. And to the extent that this somehow ties our hands, I would not support it.

COMMISSIONER SCOTT: Let's just nix this.

MR. TOPP: I mean, to the extent that it would fix the issue raised by Mr. Weigler, I think if you cross out the first sentence and leave the rest of it, that nothing grants or nothing waives an ability to challenge.

COMMISSIONER REHA: We wouldn't be able to waive -- restrict that anyway. That would be a violation of law. We wouldn't be able to restrict your ability to challenge this under our existing statutes and rules, would we?

MR. TOPP: Well, what -- I agree that you wouldn't be able to do that. What we --

COMMISSIONER REHA: It's against --

MR. TOPP: -- are concerned about --

COMMISSIONER REHA: -- public policy if we did.

MR. TOPP: What we are concerned about and what you see frequently in interconnection agreement disputes is people looking at language and

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saying based on that language that Qwest has somehow waived --

COMMISSIONER REHA: Waived it?

MR. TOPP: -- their rights. And -- And -- And so what we want to have crystal clear here is that we are not contractually waiving our rights to challenge --

COMMISSIONER REHA: Why don't you just say that? Qwest is not contractually waiving its rights to challenge anything that this commission does under existing law, or something to that effect.

MR. TOPP: I think if you used those exact words and we put it in, we would be fine with it.

MS. LEHR: Chair Koppendrayer, I just --

CHAIR KOPPENDRAYER: Ms. Lehr.

MS. LEHR: I don't know why this is any different than any issue that comes before the commission. In order to make a change, you have to issue an order, and Qwest can do recon. And, I mean, I don't -- I just am -- I don't know. Maybe I'm missing something. But it just seems like we're going through a lot of process. Just like the UNE process, I mean, it's the process that we always

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use.

COMMISSIONER REHA: Come up with some language. We'll see if my colleagues agree.

MR. TOPP: Nothing in this MPAP constitutes a grant or waiver of either parties' rights to challenge changes made to this plan by the commission.

MR. WEIGLER: Chair Koppendrayer, Commissioners --

CHAIR KOPPENDRAYER: Thank you. Mr. Weigler.

MR. WEIGLER: -- the only problem is is that there's some provisions in the PAP that do -- where Qwest does grant authority for you. For example, to change PIDs. They've always said that they have granted you the authority to change PIDs. And so -- And, also, you have some innate authority under the plan to do -- to conduct six-month reviews. And so to say that you don't have any -- nothing in this MPAP constitutes a grant of authority --

COMMISSIONER REHA: I don't like the grant. I like the waiver. Nothing in this, you know, constitutes a waiver of Qwest's ability to appeal commission order. I'm uncomfortable with

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that. I don't need a grant or -- grant of -- They shouldn't be concerned with the -- what our -- our rights are.

CHAIR KOPPENDRAYER: You've exhausted my law degree.

COMMISSIONER JOHNSON: Except that don't you think they already have that in place?

COMMISSIONER REHA: Well, they probably already do.

COMMISSIONER JOHNSON: So we wouldn't have --

COMMISSIONER REHA: But a lot --

COMMISSIONER JOHNSON: -- to have any --

COMMISSIONER REHA: But --

COMMISSIONER JOHNSON: -- of it.

COMMISSIONER REHA: Well, they essentially -- I don't see any harm in -- for them, if it gives them a comfort level --

CHAIR KOPPENDRAYER: Oh --

COMMISSIONER REHA: -- to say that --

CHAIR KOPPENDRAYER: Then let's --

COMMISSIONER REHA: -- they haven't waived their rights.

COMMISSIONER JOHNSON: Then let's do it and move on.

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COMMISSIONER REHA: It's not a problem.
COMMISSIONER SCOTT: Okay with the waiver and not the grant?
MR. TOPP: We're fine.
CHAIR KOPPENDRAYER: Thank you.
Mr. Oberlander.
MR. OBERLANDER: Mr. Chair, Commissioners, just a question for Qwest. Then it's my understanding that Qwest will agree to withdraw the language from the SGAT filed with the FCC and substitute this new language that's just been discussed?
MR. TOPP: We will.
COMMISSIONER REHA: Very good.
CHAIR KOPPENDRAYER: So ordered.
COMMISSIONER REHA: Sounds good to me.
COMMISSIONER JOHNSON: Okay. What's next?
CHAIR KOPPENDRAYER: Who's next?
MR. TOPP: Issue 15 is termination provision. The -- In ordering the MPAP the commission eliminated a termination provision. We have suggested a provision that gives us the right to petition five-and-a-half years down the road for termination of the MPAP if that's appropriate. And

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I don't think that that's a real big deal because I think we would have that ability regardless. But we have suggested this language to give us that explicit ability.
COMMISSIONER SCOTT: You actually provide in here for your exiting the interLATA market? That's kind of intriguing. For exiting this market that you're fighting like hell to get into --
MR. TOPP: I would be --
COMMISSIONER SCOTT: -- you're planning on that?
MR. TOPP: I would be shocked if, in fact, that would come about or would occur. However, you know, I think the thought is if -- were that to occur in some way, shape, or form, then the need for the MPAP would -- wouldn't be present.
COMMISSIONER SCOTT: Be honest, Jason. Are you thinking of structurally separating?
MR. TOPP: I can honestly tell you, no, we are not.
CHAIR KOPPENDRAYER: But you never know what might happen down the road; right?
COMMISSIONER JOHNSON: We needed that.
CHAIR KOPPENDRAYER: Does anyone have a problem with the five-and-a-half years?

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Ms. Lehr.
MS. LEHR: Chair Koppendrayer, I just wanted to raise one issue. Talking about Qwest exiting the interLATA market, I mean, if the FCC were to withdraw their grant of authority to provide interLATA -- provide interLATA services, then I think we also have to agree that it's okay for them to not comply with these local service requirements. I mean, if they -- If the FCC withdrew their certificate, which they did temporarily withdraw I think New York's at one point, then what you're saying is they would -- Qwest would no longer have to comply with their --
CHAIR KOPPENDRAYER: But --
MS. LEHR: -- QPAP.
CHAIR KOPPENDRAYER: -- isn't this kind of like -- If we get to that point, we're back to square one, and we start this whole process over again.
MS. LEHR: But, Chair Koppendrayer, New York's certificate was at least temporary put on hold because when they -- when they actually got the authority, I think they couldn't process our orders. I mean, there -- I think it's a legitimate --
CHAIR KOPPENDRAYER: But that has

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implications that we don't anticipate right now or would be foolish to try to anticipate.
COMMISSIONER REHA: This -- This looks to me like a lawyer dotting I's and crossing T's and making sure that there's an escape clause, if necessary. And I guess I don't have a problem with it. I don't know about the time frame. Nobody has spoken to the time frame. But I don't have a problem with this.
COMMISSIONER SCOTT: But I asked a question about the first sentence, but I think it's the second sentence that's really in dispute. The second sentence basically sets up a five-and-a-half year term. The department and CLEC coalition say, Look, Commission, you -- you rejected a six-year term; and now the first sentence is really nice; it's sort of distracting and kind of cool; but the second sentence really then just brings back what you already rejected. That's what --
MS. ZELLER: And, Mr. Chair, Commissioners, that is correct. Your interpretation is correct. We felt, to be consistent, this is -- as well as the first round, which we cared a lot about, which undermined your commission authority to make changes, this was also out of process to have

APPENDIX D

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: November 1, 2002

DOCKET NO. P-421/C-02-197

ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. § 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange companies (CLECs), has acted in a discriminatory and anti-competitive manner.

On March 12, 2002, the Commission issued a NOTICE AND ORDER FOR HEARING referring the matter to the Office of Administrative Hearings (OAH) for a contested case proceeding. The Commission determined that the issues to be addressed by an Administrative Law Judge (ALJ) were as follows:

1) whether the agreements, or any portion thereof, needed to be filed with the Commission for review;

2) whether they were filed under other settings;

3) whether there were any exculpatory reasons why they were not filed; and

4) whether disciplinary action/penalties are appropriate.

Administrative Law Judge (ALJ) Allan W. Klein was assigned to the case.

On April 29, 2002, hearings regarding the eleven agreements commenced and were completed on May 2, 2002.

On May 24, 2002, the Department petitioned the ALJ to reopen the record to admit evidence regarding an alleged, newly discovered, oral, twelfth agreement. The ALJ granted the Department's request.

On August 6, 2002, the ALJ heard arguments regarding the twelfth agreement.

On September 20, 2002, the ALJ submitted his *Findings of Fact, Conclusions, Recommendation and Memorandum* (ALJ Report) to the Commission.

On September 30, 2002, Qwest filed exceptions to the ALJ Report.

On October 4, 2002, the Federal Communications Commission (FCC) issued its Memorandum Opinion and Order in *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope and Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)* (WC Docket No. 02-89, October 4, 2002). The FCC stated in ¶ 8:

> [W]e find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). [emphasis in original].

On October 8, 2002, Commission staff requested comments from parties regarding the impact of the FCC's Memorandum Opinion and Order on the current proceeding.

On October 10, 2002, replies to Qwest's exceptions were filed by AT&T.

On October 11, 2002, replies to Qwest's exceptions were filed by the Department.

On October 16, 2002, the following parties filed comments regarding the impact of the FCC's October 4, 2002 Memorandum Opinion and Order on the current proceeding: Qwest, the Department, and AT&T.

The Commission met to consider this matter on October 21, 2002.

FINDINGS AND CONCLUSIONS

I. SUMMARY OF COMMISSION ACTION

In this Order the Commission adopts the ALJ's report in its entirety, including the ALJ's findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms.

The Commission also finds, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat.§ 237.121, subd. 5, and Minn. Stat. § 237. 60, subd. 3.

Finally, the Commission adopts the ALJ's recommendation that the Commission take action against Qwest for its activities detailed in the ALJ's report.[1] To prepare to decide what form that action should take, the Commission will schedule input from the parties regarding what the precise remedies (monetary and/or non-monetary) should be in this matter.

II. ALJ'S REPORT

The ALJ concluded that :

- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 251, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 252, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 251 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 252 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. The Commission is not limited, however, to a monetary penalty. Subdivision 9 of that statute explicitly allows the Commission to use other enforcement provisions available to it for these same violations.

Based on these conclusions, the ALJ recommended that the Commission take action against Qwest for its activities detailed in his Report.

III. QWEST'S EXCEPTIONS TO THE ALJ'S REPORT

Qwest objected to the ALJ's Report, arguing the following.

- The ALJ Report is fundamentally flawed because it applies a nonexistent standard and ignores the weight of the evidence in recommending that the Commission impose penalties against Qwest.
- The standard proposed, defining which terms must be filed for approval, is so broad and indefinite that it is impossible to apply.
- There is no evidence in the record that Qwest knowingly and intentionally did not file agreements under § 252.

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[1] ALJ Report, page 54.

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- The record is replete with unrebutted evidence of non-discrimination, which the ALJ Report improperly disregards.

- The ALJ Report erred in finding that penalties should be assessed. There is no evidence in the record that Qwest saved anything by not filing; that CLECs sustained any harm; that there are any past violations; that Qwest did not take corrective action; that Qwest structured the agreements to avoid disclosure; or that Qwest's revenues, assets, and ability to pay support penalties.

IV. COMMISSION ANALYSIS OF THE ALJ'S REPORT

A. Knowing and Intentional Failure to File Interconnection Agreements

The ALJ analyzed eleven written agreements between Qwest and various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA that Qwest has never reduced to writing and submitted to the Commission for approval.

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.[2]

Accordingly, the Commission agrees with the ALJ that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.[3]

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[2] As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10.

[3] See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

B. Discrimination

47 U.S.C. § 251 (b) (1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale, and § 251 (c) (2) (D) requires LECS to provide interconnection on rates, terms and conditions that are nondiscriminatory. Section 251 (c) (3) requires incumbent LECs to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

In each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than the terms, rates and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest discriminated against the other CLECs in violation of Section 251.

Furthermore, there is no question that Qwest knew that it was extending special terms to the select CLECs and that it was keeping these terms secret from CLECs in general. Accordingly, the Commission agrees with the ALJ that Qwest's discrimination in violation of 47 U.S.C. § 251 was knowing and intentional.[4]

Qwest argued that before a violation of discrimination under 47 U.S.C. § 251 can be found, the Commission must find that the secretly offered term, rate or condition was something that particular CLECs desired and qualified for and that the unavailability of that term, rate, and condition injured particular CLECs. Qwest's argument is a diversion. Clearly, Section 251 is not simply a remedial provision for individual CLECs, but an important regulatory tool to assure a level playing field between competing local service providers. The extent of monetary harm caused to particular CLECs is a relevant factor to be shown and considered in determining monetary penalties and non-monetary remedies in a subsequent phase of this proceeding.[5] But as a foundation for simply finding violation of the anti-discrimination provisions of Section 251, the particularized findings of monetary harm that Qwest would require are unnecessary.

In short, with respect to violation of the anti-discrimination provisions of Section 251, the question is simply: did Qwest offer preferential interconnection-related treatment to some CLECs? The Commission finds that Qwest did, and this is discrimination under Section 251.
And with respect to "knowing and intentional," the question is: did Qwest know that it was offering preferential treatment to some CLECs and intend to give that preferential treatment? The Commission finds that it did know it was offering preferential treatment and intended to offer preferential treatment, which makes its action knowing and intentional. Accordingly, the Commission agrees with the ALJ's findings that Qwest knowingly and intentionally violated 47 U.S.C. § 251.

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[4] See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

[5] Harm to customers or competitors is specifically listed by Minn. Stat. § 237.462 as a factor to consider in determining the amount of penalty to be imposed, not whether a penalty should be imposed.

V. VIOLATION OF STATE STATUTES

The record compiled by the ALJ also supports finding that Qwest has violated state laws in at least three respects.

Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service. As discussed above, Qwest has provided preferential treatment to some CLECs and has done so knowingly and intentionally, in violation of federal law. The discriminatory actions cited, therefore, also knowingly and intentionally violate the above-cited Minnesota statutes because the discriminatory activity is the same and the local service affected is clearly intrastate service.

Minn. Stat § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." It is an unreasonable restriction on resale to withhold favorable terms offered to competitors.

The Commission notes that these findings of knowing and intentional violations of these state statutes trigger possible imposition of administrative monetary penalties under Minn. Stat. § 237.462 and non-monetary remedies pursuant to Minn. Stat. § 237.462, subd. 9.

VI. REMEDIES PHASE OF THE PROCEEDING

Based on the findings and conclusions of the ALJ's Report and the findings and conclusions herein, the Commission will proceed to consider what remedies appropriately address the situation.[6] The Remedies Phase will include consideration of 1) penalties for violation of state and federal law pursuant to Minn. Stat. § 237.462 and 2) non-monetary corrective measures which derive from other Commission authority or 3) those which the Commission must refer to the Attorney General or other appropriate authorities for pursuit.

The Commission will invite remedies proposals from all parties and provide each party opportunity to comment upon each others' proposals.

Parties should analyze their proposals and evaluate the proposals of others with reference to the factors set forth in Minn Stat. § 237.462, subd. 2(b) and Minn. Stat. § 237.462, subd. 9. Among the issues that parties may wish to address in the course of their comments are the following:

1. Quantification of monetary harm done to specific CLECs by the activity found in the ALJ's Report (and confirmed in this Order) to have taken place.

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[6] This Order adopts the ALJ's Report in its entirety. In the Remedies Phase which follows this Order, therefore, no part of the ALJ's Report will be subject to revisiting and no issue addressed in that Report will be subject to relitigation or reargument. The Report's findings and conclusions may be utilized as bricks to help construct any argument for or against any remedies proposal.

2. Quantification of monetary benefit accruing to the benefitted CLECs and Qwest by this activity.

3. A rationale, including the mathematical calculation (number of violation days times a dollar amount for each violation day), for any monetary penalty proposed.

4. Public interest analysis (pluses and minuses) of various non-monetary remedies, including structural separation and revocation of Qwest's certificate of authority.

5. Whether any information in this docket is properly classified as trade secret or whether the entire record in this matter should be available to the public.

6. Proposed treatment of the interconnection agreements that have been subject to this proceeding that have not been terminated.

Parties' comments will be provided by briefs and supporting affidavits pursuant to the following schedule, which Qwest proposed and to which other parties agreed:

November 8	parties submit opening briefs and supporting affidavits
November 15	parties submit reply briefs and supporting affidavits

VII. ROLE OF THE BENEFITTED CLECS

This docket has focused, properly, on Qwest, the central player in the undisclosed interconnection agreements episode. As the incumbent local exchange company (ILEC) in this matter, Qwest holds a unique economic position and certainly bears direct and obvious responsibility under the cited federal and state statutes. The Commission is also concerned, however, about the role of certain CLECs that have participated in and benefitted from the illegal Qwest activity documented in this record. The Commission welcomes the Department's expressed commitment to examine the role of these CLECs and bring these matters forward for Commission consideration in due course and as warranted.

ORDER

1. The Commission adopts the Administrative Law Judge's Report in its entirety, including its findings that Qwest has knowingly and intentionally violated federal laws regarding the interconnection agreement provisions cited therein. A copy of the ALJ's Report is incorporated by reference.

2. The Commission finds that Qwest has also knowingly and intentionally violated state laws as enumerated above at page 6 of this Order.

3. The Commission initiates the Remedies Phase of this proceeding by establishing a comment period, as discussed above at pages 6 and 7 of this Order.

4. The schedule for the Remedies Phase is as follows:

November 8	parties shall submit opening briefs and supporting affidavits
November 15	parties shall submit reply briefs and supporting affidavits
November 19	Commission hearing

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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APPENDIX E

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ellen Gavin	Commissioner
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: February 28, 2003

DOCKET NO. P-421/C-02-197

ORDER ASSESSING PENALTIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest Corporation (Qwest) filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange carriers (CLECs), has acted in a discriminatory and anti-competitive manner. The complaint was ultimately amended to include a twelfth agreement.

On March 12, 2002, the Commission in its NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for a contested case proceeding.

On September 20, 2002, Administrative Law Judge (ALJ) Allan W. Klein submitted his Findings of Fact, Conclusions, Recommendation and Memorandum (ALJ Report) to the Commission.

On November 1, 2002, the Commission issued its ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES. The Commission found that Qwest knowingly and intentionally violated federal and state law and established a comment period to address possible remedies.

On November 19, 2002, the Commission met to consider possible remedies.

On December 18, 2002, the Commission issued its ORDER REQUIRING PLAN AND AUTHORIZING COMMENTS wherein the Commission ordered Qwest to file proposed plans with respect to remedies which would further competition in Minnesota.

On December 19, 2002, Qwest filed its proposed remedies. Responses to Qwest's proposal were filed by numerous parties:

Minnesota Department of Commerce	Minnesota Department of Administration
Northwestern Bell/ US West Retiree Association	Suburban Rate Authority
Minnesota Municipal Utilities Association	Minnesota Office of the Attorney General - Residential and Small Business Utilities Division (RUD-OAG)
CLEC Coalition[1]	AT&T
MCI WorldCom	Time Warner Telecom
Wholesale Service Quality Coalition[2]	Onvoy

The Commission also received comments from a number of Minnesota businesses and communities. These comments are part of the record available to the Commission and to any member of the public wishing to review them.

The Commission met on February 4, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. INTRODUCTION

In its November 1, 2002 Order in this matter, the Commission adopted the ALJ's report in its entirety, including the Administrative Law Judge's (ALJ's) findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms. Order at page 3.

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[1] **CLEC Coalition:** This coalition comprises the following 12 CLECs: Ace Telephone, Hickory Tech, HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, Unitel Communications, US Link, and 702 Communications.

[2] **Wholesale Service Quality Coalition (WSQ Coalition):** This coalition is distinct from the CLEC Coalition, although some parties are members of both coalitions. The WSQ Coalition consists of 13 parties: the Department of Commerce, AT&T, Covad, Eschelon, Global Crossing, McLeodUSA, New Edge Networks, Onvoy, WorldCom, Encore, NorthStar Access, US Link, and Time Warner.

The Commission also found, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat.§ 237.121, subd. 5, and Minn. Stat. § 237. 60, subd. 3. Order at page 6.

The Commission also adopted the ALJ's finding that the Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. Order at page 7.

Moving to a Penalty Phase in succeeding months, the Commission has received and considered recommendations and comments from the parties regarding the size and nature of the penalties and has conducted two hearings to receive parties' comments. In this Order, the Commission sets forth its Penalty Phase decision and rationale.

An Order assessing penalties under Minn. Stat. § 237.462, such as the current Order, includes

(1) a concise statement of the facts alleged to constitute a violation;
(2) a reference to the section of the statute, rule, or order that has been violated;
(3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
(4) a statement of the person's right to review of the order. Minn. Stat. § 237.462.

II. QWEST'S VIOLATIONS

A. Failure to File: Violation of 47 U.S.C. § 252(a) and (e)

47 U.S.C. § 252(a) and (e) required Qwest to file interconnection agreements with the Commission. The ALJ found and the record shows that Qwest made eleven written agreements with various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA (McLeod) that Qwest has never reduced to writing and submitted to the Commission for approval. By failing to file these agreements, Qwest violated 47 U.S.C. § 252(a) and (e).

B. Discriminatory Conditions on Resale: Violation of 47 U.S.C. § 251(b)(1)

47 U.S.C § 251(b)(1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale and 47 U.S.C. § 251(c)(2)(D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. In addition, 47 U.S.C. § 251(c)(3) requires incumbent LECs such as Qwest to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

The ALJ found and the record shows that in each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than

the terms, rates and conditions that it made available to the other CLECs and, in fact, kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs, thereby discriminating against them in violation of the cited provisions of Section 251.

C. Violation of State Anti-Discrimination Statutes

As the Commission found in its November 1, 2002 Order adopting the ALJ's Report, Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service and Minn. Stat § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." The ALJ found and the record supports the Commission's finding that Qwest has provided preferential treatment to some CLECs in violation of federal law. The discriminatory actions cited also violate the above-cited Minnesota statutes because the discriminatory activity is the same (providing preferential treatment to some CLECs) and the local service affected is clearly intrastate service. Qwest's activity withholding from most CLECs the favorable terms offered to others also violates the "unreasonable restriction on resale" provision of Minn. Stat § 237.121, subd. 5. See Order at page 6.

III. AMOUNT OF PENALTY IMPOSED

The Commission has reviewed the record, including the filings of the parties specifically on penalty issues, in light of the factors that Minn. Stat. § 237.462, subd. 2 directs it to consider in setting penalty amounts. Having completed this review, the Commission will assess a penalty of $10,000 per day for two of the unfiled agreements that had the greatest anti-competitive and discriminatory negative impact (Eschelon IV and McLeod III) and $2,500 per day for the remaining 10 unfiled agreements for a total of $25.95 million.[3]

The distinction in penalty levels for the various agreements is justified because while failure to file all the agreements was serious and warrants a significant penalty, as discussion of the statutory factors applicable to all the agreements shows, failure to file the Eschelon IV and McLeod III agreements disadvantaged the other CLECs on a much larger scale. Therefore, Qwest's knowing and intentional failure to file these two agreements warrants the highest per day penalty allowed. Distinguishing characteristics of these two agreements are set forth below.

Eschelon IV - Qwest agreed to provide Eschelon with a 10 percent discount on all the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through

[3] Total violation days for Eschelon IV and McLeod III were 1,165, as delineated below, times $10,000 per violation day equals $11,650,000. Total violation days for the remaining agreements was 5,722, as delineated below, times $2,500 per violation day equals $14,305,000. Total penalty for all 12 agreements, therefore, is $25,955,000.

December 31, 2005. In addition, a "consulting" arrangement contained in the agreement was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. See ALJ's Report, Findings 124-130, pages 21-22.

McLeod III - Qwest entered an oral agreement with McLeod to provide discounts ranging from 6.5-10 percent depending on the volume of McLeod's purchases over the course of the year. The discount applied to McLeod's purchases of unbundled network elements (UNEs), payments for switched access, wholesale long distance and tariffed retail services. Testimony of a Qwest witness continuing to deny the existence of the discount agreement was found not credible. See ALJ's Report, Findings 316-345, pages 43-47.

In these agreements, Qwest provided discriminatory monetary advantages to these two CLECs far surpassing the advantages conferred by the other agreements (and, conversely, disadvantaged the other CLECs that much more deeply).

The violation day count for each agreement and calculation of the total penalty for all 12 agreements are as follows:

1. $10,000 per violation day for the most egregious behavior, the Eschelon IV and McLeod III unfiled agreements, and $2,500 per day for each of the remaining 10 unfiled agreements.[4] The Eschelon IV and McLeod III unfiled agreements involve the most serious violations by far. While all the unfiled agreements are patently discriminatory on their face and violated laws intended to protect fledgling competitors and competition in the local telephone industry and the ratepayers who are to benefit from that competition, the Eschelon IV and McLeod III violations warrant the maximum penalty allowable under the law because by giving selected CLECs such a significant price edge over their competitors (the 10% discount), they had the potential to cause the most serious damage to competition. The intentional violations connected to the 10 other unfiled agreements are also serious and damaging, but to a lesser extent. The Commission concludes that they warrant a substantial but lesser penalty amount: $2,500 per violation day.

2. For the Eschelon IV and McLeod III unfiled agreements, the violation days began on the day each was made (11/15/00 and 10/26/00, respectively) and ran until 3/1/02 and 9/20/02, 471 days and 694 days, respectively, for a total of 1,165 violation days.

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[4] Some of the agreements contained multiple violations, but the Commission will accept Qwest's suggestion and assess the penalty for each agreement that was not filed rather than for each violation contained therein.

Name of Agreement	Start Date[5]	End Date	Number of Violation Days
1. Eschelon IV	11/15/00	03/01/02[6]	471
2. McLeod III (oral agreement)	10/26/00	09/20/02[7]	694
TOTAL			1,165

3. For the remaining 10 unfiled agreements, the 5,722 violation days attributable to these agreements are calculated as follows:

Name of Agreement	Start Date	End Date	Number of Violation Days
1. Eschelon I	02/28/00	03/01/02	732
2. Eschelon II	07/21/00	03/01/02	588
3. Eschelon III	11/15/00	03/01/02	471
4. Eschelon V	07/03/01	03/01/02	241
5. Eschelon VI	07/31/01	03/01/02	213
6. Covad	04/19/00	03/01/02	681
7. Small CLECs	04/28/00	03/01/02	672
8. McLeod I	04/28/00	03/01/02	672
9. McLeod II	10/26/00	03/01/02	491
10. US Link/ InfoTel	07/14/99	03/01/02	961
TOTAL			5,722

[5] The Start Dates used in these calculations are the dates found by the ALJ as part of his Report and Recommendations. No party has challenged the Start Dates found by the ALJ for the 11 written agreements.

[6] The End Date March 1, 2001 is the date that Qwest, following the Department's complaint that Qwset had failed to file certain interconnection agreements as required by law, filed selected portions of 11 written but theretofore unfiled agreements.

[7] The End Date September 20, 2002 is the date that the Administrative Law Judge issued his Report and Recommendations in this matter, finding (among other things) the existence of this oral agreement between Qwest and McLeod.

III. STATUTORY FACTORS CONSIDERED

The penalty amount set forth in the preceding section is based upon consideration of the factors set forth in Minn. Stat. § 237.462, subdivision 3. The Commission's consideration of these factors follows.

Factor 1: Wilfulness or intent of the violation

The degree of Qwest's wilfulness and intent to violate the cited anti-competitive laws was quite high. The record indicates that Qwest's activities were not isolated, spur-of-the-moment decisions by entry-level personnel but were taken in a calculating and deliberate manner by experienced, high-ranking Qwest officials. Qwest has defended these actions as being the result of confusion over what the law required. This defense has no merit.[8]

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.[9]

In these circumstances, it is unmistakable that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.[10] Likewise, there is no question that Qwest knew that it was extending special

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[8] See ALJ Report in which he reviewed the ways Qwest was unmistakably on notice of the requirement to file these agreements (Finding Nos. 6-28) and concluded, with respect to each unfiled agreement, that Qwest acted knowingly and intentionally in failing to file these interconnection agreements and in discriminating against the unfavored CLECs. See ALJ Findings cited in footnotes 10 and 11.

[9] As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10. See WC Docket No. 02-89.

[10] See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

terms to the select CLECs and that it was keeping these terms secret from CLECs in general.[11] These discriminatory actions were taken with the clear intention to favoring some CLECs at the expense of other CLECs, reflecting a high degree of intentionality on the part of Qwest.

Factor 2. The gravity of the violations

State and federal telecommunications law has undertaken to promote competition in the local telephone market. Central to the fair development of competition in the local telephone market is the legal requirement (state and federal) that the terms and conditions that the incumbent carrier (Qwest) makes available to any local telephone provider will be made available across-the-board to all local service providers. Qwest's making secret deals with selected CLECs strikes to the heart of the government's determination to protect developing local competition.

In addition, some of Qwest's secret deals that violated state and federal law also sought to subvert the regulatory process by buying the silence of certain CLECs on matters before the Commission (US West merger with Qwest and Qwest's 271 application) and the FCC (Qwest's 271 application).[12] A relevant issue in both the merger and Qwest's 271 application is whether Qwest

[11] See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

[12] Eschelon I, Paragraph 16 - Eschelon agrees not to oppose Qwest merger; Eschelon III, 2nd Paragraph of Section 1 - Eschelon agrees not to oppose Qwest's efforts to obtain 271 authority; Covad (last paragraph) - Covad agrees to withdraw opposition to Qwest merger; Small CLECs, Paragraph 3 of the Recitals - 10 CLECs agree not to oppose merger and to encourage expeditious processing and review; McLeod I, Paragraph 1, page 2 - McLeodUSA agrees to withdraw opposition to Qwest merger; and McLeod III (oral agreement) - McLeodUSA agrees not to oppose Qwest's efforts to obtain 271 authority. See ALJ Report, Finding Nos. 361-363.

has fairly and adequately opened the Minnesota telephone market to competitors.[13] Qwest's unfiled agreements with Eschelon, McLeod, Covad, and 10 Small CLECs sought to secure the silence of those companies, thereby skewing the regulatory record. The gravity of Qwest's actions in so doing can be likened to bribing potential witnesses not to report what they saw to an administrative body.[14]

While Qwest's activity buying silence injured the regulatory process in general and is reprehensible as such, the relevant consideration for this proceeding (penalty assessment) is that it also directly harmed the unfavored CLECs in an anti-competitive and discriminatory manner. Qwest removed valuable sources of input regarding actual commercial usage and issues that major CLECs were dealing with at the time. It is reasonable to assume, as Qwest apparently believed, that McLeod and Eschelon's information would have generally hurt Qwest's position and helped the CLECs' position. By keeping relevant information from regulators, Qwest sought to skew the process in its favor, all to the detriment of the unfavored CLECs who, due to Qwest's actions, would not be receiving the benefits of proper regulatory process.

Furthermore, CLECs have been harmed monetarily and customers have been harmed by Qwest impeding fair competition in this manner. The direct and inevitable result of such anti-competitive behavior is that customers have been deprived of the benefit of a market place fairly and freely open

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[13] The Telecommunications Act of 1996 authorizes a Bell Operating Company (BOC) such as Qwest to enter in-region interLATA and interstate telecommunications services (the long distance telecommunications market) upon compliance with certain provisions of 47 U.S.C. §271. Section 271 requires the Federal Communications Commission (FCC) to make certain findings before approving a BOC application, including the following: 1) the BOC has fully satisfied each competitive checklist item contained in §271(c)(2)(B); 2) the BOC's requested authorization will be carried out in accordance with the requirements of §272; and 3) the BOC's entry is consistent with the public interest, convenience, and necessity.

As part of its 271 application, Qwest must make state-specific evidentiary showings and separately identify each state's relevant performance data. The Commission has the responsibility under §271(d)(2)(B) to advise the FCC whether Qwest meets the fourteen point competitive checklist. The FCC has asked the state commissions to fully develop a factual record regarding the BOC's compliance with the requirements of section 271 and the status of local competition. The Commission has several current dockets assessing Qwest's 271 application, including Docket Nos. P-421/CI-01-1370 (the six non-OSS competitive checklist items); P-421/CI-01-1371 (the eight OSS competitive checklist items); and P-412/CI-01-1373 (public interest, convenience and necessity considerations).

[14] Of particular note, Qwest's purchase of neutrality from Eschelon and McLeod in the 271 process sought to eliminate any relevant information and insights throughout 271 related proceedings from two of Qwest's largest competitors on issues that Eschelon and McLeod could be reasonably expected to have relevant information and views, including the Regional Oversight Committee-Operational Support Systems (ROC-OSS) test and final report and the OSS-related Commission Docket No. P-421/CI-01-1371.

to competition. While this harm may not be quantified in terms of dollars and cents, the first fruits of competition (lower prices and wider choices) were undoubtedly impacted by Qwest's anti-competitive and discriminatory behavior.

- **Example of the impact on price:** CLECs not getting the 10% discount obviously could not offer their products at a price reflecting that discount. They were, therefore, at a competitive disadvantage vis a vis the favored CLECs. This discriminatory treatment hurt both the unfavored CLECs and their customers.

- **Example of impact on choice:** CLECs not receiving the 10% discount were inhibited from expanding their local marketing efforts and potentially discouraged from entering the Minnesota local market, thereby reducing customer choice.

Finally, the gravity of the violation is judged as much by what it intended to accomplish as by quantifying the monetary harm. In this case, the Commission concludes that Qwest intended to disadvantage certain CLECs, its competitors, through illegal means. That is a grave matter.

Factor 3: History of Past Violations

This is not the first time that the Commission has had to fine Qwest for knowingly and intentionally thwarting competition in the Minnesota local market. In Docket No. P-421/C-01-391, the Commission found that Qwest knowingly and intentionally violated its obligation to act in good faith under its interconnection agreement with AT&T by

> a) creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based on Qwest's retail business interests;
>
> b) imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow...; and
>
> c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.[15]

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[15] See *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, Docket No. P-421/C-01-391,ORDER ASSESSING PENALTIES (June 18, 2002), page 9.

The specific laws Qwest violated regarding AT&T are not the ones involved in this case, but the effect and intent of Qwest's knowing and intentional actions (to benefit itself, to disadvantage its competitors, and to harm competition) is a common thread, and the harm resulting to competitors, to the competitive market, and to consumers is similar.

Also similar in both cases, the Commission found that Qwest's actions were not, as Qwest asserted, simply mistaken interpretations of its obligations. In the AT&T complaint docket, the Commission stated at page 10 of its ORDER ASSESSING PENALTIES:

> Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using that testing for market entry was **not simply a mistaken interpretation** of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications. [Footnote omitted.] The Commission recognizes that this was a further example of bad faith on Qwest's part.

Elsewhere in the ORDER ASSESSING PENALTIES, the Commission stated:

> Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not an appropriate role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that wanted information that Qwest deemed was not necessary for it to have.
>
> The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was "bogus" because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In assessing a penalty against Qwest in the amount of $7,500 per violation day, the Commission justified not levying the maximum amount authorized by statute ($10,000/day) as follows:

> ...the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done.[16] However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of $7,500 per day for the period beginning January 12, 2001 through May 11, 2001.

Given the gravity of the current violations and their similarity to the previous violations found in the AT&T Complaint, the other items identified for consideration under the "History of Past Violations" heading (number of previous violations found, the response of Qwest to the previous violation identified, and the short time elapsed since the last violation) cast comparatively little light.

Factor 4: The Number of Violations

In 12 separate unfiled interconnection agreements, Qwest committed 26 individual violations by failing to file, as required, 26 distinct provisions regarding interconnection and access to unbundled network elements (UNEs).

The significant duration of each agreement (the intended duration of the most damaging secret agreement was five years and 6 weeks) indicates Qwest's intention to advantage favored CLECs and disadvantage the non-favored CLECs for a significant period of time.

Likewise, the number of violations and several repeat violations with the same favored CLEC within a relatively short period of time also suggests that these anti-competitive and discriminatory practices were not aberrations but represented a concerted portion of Qwest strategy.

Finally, the number of violations of this sort (unfiled agreements disadvantaging competitors to Qwest's advantage) appears not to have been limited by Qwest's internal moral compass. Instead, it appears that these violations would have continued and multiplied if Qwest had not been apprehended in this activity and brought to light by the Department. These considerations auger for a significant penalty.

Factor 5: the Economic Benefit Gained by the Person Committing the Violation

Qwest gained several significant advantages for itself from its promises to the CLEC parties to the unfiled agreements. The most significant of these advantages was the promise Qwest obtained from

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[16] Note that in this case by contrast, Qwest has never agreed to offer CLECs the same deals it gave Eschelon and McLeod.

Eschelon and McLeod USA, two of Qwest's largest wholesale customers, to remain neutral (silent) during the consideration of Qwest's Section 271 applications by state and federal regulators.[17]

Qwest undoubtedly benefitted monetarily from the portions of the unfiled agreements that secured silence from certain CLECs regarding Qwest's 271 petition. First: Qwest did not have to deal with objections and complaints from Eschelon and McLeod, two of the largest CLECs in Minnesota, in the context of its 271 petition. This immediately saved Qwest legal and administrative expenses that defending against those objections would entail. Moreover, Qwest clearly believed that purchasing the silence of Eschelon and McLeod enhanced Qwest's chances of a favorable outcome for its 271 petition. While the exact value to Qwest of a successful 271 petition (revenues to be achieved upon re-entry in the long distance market in Minnesota and its 14-state region) has not been established in this docket, there can be no question that its monetary value to Qwest is considerable, given the substantial resources Qwest has invested in that project in Minnesota and elsewhere in its 14-state region.

Qwest benefitted monetarily from the neutrality portions of the unfiled agreement in not having to address in a number of Minnesota dockets the substantial service-related problems experienced by Eschelon. ALJ Finding No. 370, page 51.

Qwest secured guaranteed revenue streams of $150,000,000 from Eschelon and a significant sum from McLeod as part of its unfiled discount agreements. By entering into the unfiled discount argument with McLeod, Qwest also secured McLeod's commitment not to remove its telecommunications traffic from Qwest's network. ALJ's Finding No. 317, page 51.

By concealing both discount agreements and keeping them unavailable to other CLECs, Qwest benefitted by saving several million dollars in Minnesota alone. ALJ Finding No. 372, page 51.

Factor 6: Corrective Actions Taken or Planned

The Commission believes that what has been most damaged by Qwest's anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs.

The ALJ concluded:

> Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint. Qwest does intend to seek Commission consideration of a subset of the provisions complained about here, but only if the Commission first determines that it must. ALJ Report, Paragraph 380, page 52.

Following its adoption of the ALJ's Report, the Commission has given Qwest two opportunities in the Penalty Phase of this proceeding to propose corrective actions (penalties). The actions proposed to be taken by Qwest in its Penalty Phase filings fail to address the identified harms and their root.

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[17] See ALJ's Report, Paragraph 369, page 51.

Moreover, Qwest's proposals fail to take responsibility for its anti-competitive and discriminatory behavior and may, as the following analysis shows, actually serve to retard, rather than restore, competition in Minnesota. The components of Qwest's proposed penalty package are evaluated as follows.

1. Opt-in

Qwest proposed to allow CLECs to opt-in to 21 of the 26 initially unfiled provisions, waiving the procedures that require Commission approval. For the remaining five provisions, Qwest states that it will make these provisions available for opt-in to any Minnesota CLEC that has the same disputes and has not reached alternative resolution. Qwest's proposal was not the same as the terms in the agreements that included both interstate and intrastate services and which covered all states in Qwest's region for both interstate and intrastate services. While Qwest's proposal has some value, making the 26 provisions available is clearly preferable to Qwest's proposal, as part of a restitutional remedy. See discussion below.

2. Ten Percent Discount/Credit

Qwest proposed to give CLECs credit against future purchases of an amount equal to 10% of their purchases of Section 251(b) or (c) items in Minnesota under any interconnection agreement or Statement of General Available Terms (SGAT) during the time period from January 1, 2001 through June 30, 2002. Qwest stated that Eschelon and McLeod would not be eligible for this credit.

Qwest's proposal would restore some of the detriment caused to CLECs and therefore contribute to undoing the anti-competitive effects of its actions. However, it is also similar to agreeing to put back some but not all of the candy taken from the grocery store and as such cannot be considered a penalty.

3. Wholesale Service Quality Standards

As part of this Penalties Phase, Qwest proposed wholesale service quality standards that are inferior to certain aspects of the Minnesota Performance Assurance Plan (MPAP) adopted by the Commission on November 26, 2002 in Docket No. P-421/AM-01-1376. In addition, Qwest's proposed standards are inferior to standards developed by the Department and a coalition of CLECs and now currently before the Commission for adoption in the Wholesale Service Quality Standards proceeding. Docket No. P-421/AM-00-849. Adoption of the lower standards proposed by Qwest in this Penalty Phase would conflict with the Commission's MPAP decision and improperly preempt a decision soon to be made on the record established in the Wholesale Service Quality Docket.

4. Minnesota Liaison

Qwest proposed to make a designated executive available to Minnesota CLECs to serve as a liaison if the normal reporting hierarchy is not successful in resolving disputes. Since most interconnection agreements currently have an escalation process, Qwest's proposal has value beyond current practices only if the liaison is granted authority to make decisions and resolve the complaint in a

timely manner. It would be time-consuming to track the success of this proposal, whose effectiveness would only be shown by a fact-intensive analysis over a long period of time. In these circumstances, the proposal has marginal value as a penalty or to restore/enhance the competitive market place.

5. Review Committee and Independent Auditor

Qwest announced a number of changes to its internal decision-making procedures to ensure future compliance with all the legal requirements at issue in this proceeding. Qwest suggested that a new "filing standard" will help, that these mistakes were made due to inexperience, and that this will not happen once "experienced regulatory and legal personnel" are involved, and that restructuring the Wholesale Business Development Department is key to this not happening again.

Any changes Qwest needs to ensure that it complies with the law would be a benefit to Qwest and can hardly be viewed as a penalty. Moreover, reporting these changes as necessary to comply with the law simply continues Qwest's unfounded defense that its failure to file the agreements in question was the result of confusion or ambiguity about what the law required. Emphasizing these changes continues Qwest's pattern of denial regarding the knowing and intentional violations of the law found by the ALJ and the Commission in this matter.[18]

6. Voicemail to CLECs

Qwest proposed to provide CLECs the opportunity to purchase voicemail at retail prices from Qwest for use in conjunction with the CLEC's UNE-P functions for the next three years. The benefit to CLECs over the status quo is limited since existing law arguably requires the provision of voicemail to CLECs at retail prices. In addition, Qwest's proposal is limited to three years.

While Qwest's proposal may reduce the barriers to competition for the three-year period, the three-year limit places the CLEC in the awkward position of marketing a product to customers when it will be unable to continue to provide the service in a relatively short time. Customers of CLECs may well feel that they have been subject to "bait and switch" tactics once they learn that the CLECs cannot continue the voicemail service after three years. In addition, CLEC customers who have grown accustomed to having voicemail from the CLEC over the three year period will experience diminished service from the CLEC when voicemail is no longer available through the CLEC and will be ripe for recruitment by Qwest.

Finally, Qwest has acknowledged that its proposal will result in additional revenue to Qwest. Therefore, it cannot be viewed as a penalty.

7. Promise to Add 100 Jobs in Minnesota

Due to commitments Qwest made in the Stipulation and Agreement approved by the Commission in

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[18] See Commission discussion of the knowing and intentional nature of Qwest's violations, above at page 4.

the Qwest merger[19], Qwest already has an outstanding commitment to add 300 new jobs in Minnesota. Compliance with that commitment has not been verified. As part of its Penalty Phase package, Qwest proposed to add an additional 100 jobs in Minnesota (50 in Duluth and 50 elsewhere). At the November 19, 2002 hearing on this matter, Qwest clarified that the 50 jobs in Duluth are jobs Qwest was planning to eliminate.

In the face of employment trends in the telephone industry, realization of the job commitments is doubtful at best. The realities of enforcing Qwest's employment pledges aside, Qwest's promise to retain 50 jobs in Duluth and add 50 jobs elsewhere in Minnesota is not logically related to undoing past discrimination and anti-competitive violations or ensuring against such illegal activity in the future. Any benefits actually realized from such a proposal (benefits to the particular workers and the communities affected) do not relate to the harms caused by Qwest's anti-competitive and discriminatory actions. They do not restore damaged CLECs or advance the competitive market in Minnesota. Provision of 100 jobs would not increase the ability of competitors to compete. Instead, the Company's gesture aimed at generating good will among its employees will increase Qwest's ability to compete. This may be a wise business decision by Qwest but it certainly is not a penalty.

8. Expanded DSL Offerings

Qwest proposed to offer DSL to twelve rural exchanges of its choosing. Qwest valued its proposal to expand digital subscriber loop service (DSL) deployment at $5 million.

The Commission favors expansion of DSL deployment to enable residential and business customers in rural exchanges to have high speed internet access. However, there are downsides to Qwest's proposal that mitigate its benefit.

First, one of the targeted exchanges (Waseca) already has DSL provided by a CLEC; at least two of the exchanges (Luverne and Albert Lea) have a CLEC competitor for high speed internet access; and all of the exchanges identified in Qwest's proposal (except Pine City) have high speed internet access available through the local cable company. The current availability of an adequate high speed internet product and consideration for the investments made by CLECs and cable operators in Minnesota diminishes the incremental value of Qwest's DSL deployment proposal.

In addition and more fundamentally, however, the record does not indicate that this or similar deployment would not have occurred anyway, regardless of the penalty phase of this proceeding. It has not been established, for example, that such deployment is not cost effective for the Company.

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[19] On June 28, 2000, the Commission issued its ORDER ACCEPTING SETTLEMENT AGREEMENT AND APPROVING MERGER SUBJECT TO CONDITIONS in Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192. In that Order, the Commission approved the Stipulation and Agreement regarding the merger of the parent corporations of US West, LCI International Telecom Corp., USLD Communicating, Inc., Phoenix Network, Inc., and US West Communications, Inc.

Instead, it clearly will leave the Company in a better position to compete in the locations where deployment occurs, in response to competitive challenges in those exchanges.

Once again, therefore, it appears that Qwest's proposal to deploy DSL does not relate to mitigating or remediating the harms to CLECs or to the competitive market caused by the Company's anti-competitive and discriminatory behavior but may well exacerbate those harms.

9. Privacy Product to Senior Citizens

Qwest proposed to provide its "No Solicitation" product free of charge for three years to both Qwest subscribers and CLEC subscribers that are 65 and older. The product plays a taped message at the beginning of every phone call directing solicitors to add the called number to the do-not-call list and to hang up the phone.

Several factors decrease the value of this product. Minnesota law has established a do-not-call list on which subscribers of any age can be listed for free. Telemarketers who place calls to persons on the state's do-not-call list are subject to penalties set forth in the statute. Other advantages of the state's do-not-call list over Qwest's "No Solicitation" product are: 1) the state's method does not subject all callers to the "No Solicitation" product's taped message; and 2) subscribers need not disclose their age to obtain for free the protection of the state's do-not-call list.

In addition, as a switch-based functionality, the product will only be available to those CLECs that use Qwest to perform their switching function. The product will not be available to customers of CLECs that are facility-based providers and CLECs that purchase UNEs but use their own switching. Thus, to the extent that the No Solicitation product has value, Qwest providing the product at no cost to Qwest end-use customers and customers of CLECs that use Qwest's switching functionality will disadvantage CLECs that provide their own switching. Generally speaking, measures adopted to repair damage to CLECs and the competitiveness of the market place should not favor some CLECs over others. Prejudice against CLECs who do not use Qwest's switching functionality is not warranted.

Finally, like many of the proposed "penalty" components previously addressed, offering the "No Solicitation" product free to seniors does not relate to restoring injured CLECs or to enhancing the injured competitive market. Also, like the employment promises and the proposed DSL deployment to select rural communities, the free "No Solicitation" offer to seniors appears intended to generate goodwill for Qwest in this matter rather than to provide a reasonable penalty for its illegal activity.

In sum: Based on the foregoing analysis, Qwest's proposed penalties provide for greater benefits to Qwest than to its CLEC competitors, Minnesota consumers, or the Minnesota telecommunications marketplace.

Factor 7: Annual Revenue and Assets of the Company Committing the Violation

Qwest Communications International, Inc., Qwest's parent, has publicly reported annual revenues of over $230 billion and assets of over $74 billion for the year 2001. See ALJ Report, Finding #382,

page 53. Given these resources, the penalty assessed in this Order will not impact the Company unreasonably.

Factor 8: Financial Ability of the Company to Pay the Penalty

The ALJ noted that Qwest, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, has $20 billion in annual revenue. The ALJ found that Qwest has the financial ability to pay any fine assessed by the Commission. The ALJ cited Qwest's witness Audrey McKinney as supporting that conclusion. ALJ Report, Finding #383, page 53.

The Department observed that while Qwest has had some difficult financial times in the past for its total operations, there has been no indication that Qwest's Minnesota operations have been anything but financially successful. The Department noted that Qwest's choice to operate under an Alternative Form of Regulation (AFOR) was based on the incentive to retain revenues beyond what it would be allowed under rate of return regulation. And although Qwest's AFOR Plan protects consumers of basic service from price increases over the five-year term of the plan, the Department noted that the AFOR plan does not prevent Qwest from increasing the rates for services in the remaining two categories of services: flexibly priced and non-price regulated services. Since its AFOR was adopted, Qwest has increased the rates for various services classified as flexibly priced and non-price regulated services.

Some indication about Qwest's financial ability in the penalty phase context can be gained from the monetary valuation the Company has put on the value of its own penalty proposals. While Qwest characterized the exact dollar valuation of its proposed remedies as a trade secret, suffice to say that it is a figure substantially larger that the penalty amount assessed against Qwest in this matter.

Factor 9: Other Factors - Deterrent Effect

The Commission believes it is desirable to motivate Qwest to desist in the future from anti-competitive behavior. Many parties have identified the problem as being Qwest's view of (hence treatment of) wholesale customers as competitors to eliminate rather than as customers to serve. They have suggested that the goal must be to reform Qwest's approach, to lead it from the anti-competitive behavior identified in this and related dockets and to build a competitive environment which motivates Qwest to begin treating wholesale customers as customers rather than competitors. In that context, the Commission believes that a proper consideration in determining the size of a monetary penalty is that it be large enough to motivate abandonment of anti-competitive behavior by indicating the seriousness with which the Commission views such behavior. In addition to being consistent with the factors previously addressed, the fine must be appropriately sized 1) to clearly indicate what Qwest can expect next time if it does not abandon its anti-competitive and discriminating behaviors and 2) hence, to deter such behavior.

IV. APPROPRIATE CORRECTIVE ACTIONS TO BE TAKEN BY QWEST

The Commission believes that what has been most damaged by Qwest's discriminatory and anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs and their customers. As shown above, Qwest's proposals fail to take responsibility for its anti-competitive behavior and would further retard, rather than restore, competition in Minnesota. And while the penalty amount discussed above is warranted under the statutory considerations to punish serious knowing and intentional activity and to deter future activity of that kind, it does not directly address the key harms to competition in Minnesota identified by the Commission.

Appropriate Corrective Action for Discriminatory Acts

Local competitors and local competition that have been unquestionably harmed by Qwest's anti-competitive and discriminatory actions must be restored to the greatest extent feasible. While the Commission cannot turn back the clock and let competition proceed as it would have absent this anti-competitive activity, the Commission can take realistic steps in that direction as part of the Commission's authority to remediate the effects of Qwest's discrimination.[20]

Specifically, appropriate remediation requires three things.

First, Qwest must make the 26 provisions in the unfiled agreements identified in this case available to the CLECs.

Second, Qwest must allow the CLECs to experience (for a two-year period, November 15, 2000 to November 15, 2002) the savings they would have experienced, had the unfiled agreements been filed and, hence, available for them. This reasonable restoration period will strengthen them financially, allowing them to compete more vigorously. Since the money in question (money over and above the price the CLEC would have paid if it had the benefit of the best of the unfiled agreements) is money that the CLECs have already paid to Qwest, the CLECs who have overpaid due to Qwest's illegal act should receive that amount from Qwest in cash or as a credit toward future purchases, whichever the CLEC chooses.

Third, Qwest should allow CLECs to purchase services from Qwest at the same price that would have been available to them under their choice of the unfiled agreements for a 24-month period, beginning with the date of this Order.

The second and third requirements cover a 48 month period altogether, which is reasonable, given that the length of the most favorable of the unfiled agreements (hence the length of the agreements that the CLECs would have chosen) was 5 years and 6 weeks. Had these agreements been filed (made public) as the law required, other CLECs would have been able to adopt them for the same time period.

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[20] Minnesota's anti-discrimination statutes, Minn. Stat. §§ 237.09, 237.60, subd. 3, and 237.121, subd. 5.

There are two exceptions to the second and third requirements. Two CLECs, Eschelon and McLeod, were the beneficiaries of the two most favorable unfiled agreements. They participated in and benefitted from Qwest's illegal activity and were prepared to do so for the full length of their agreement. Moreover, when the Department brought these agreements to light and Qwest terminated their agreements, they received substantial buy-out payments from Qwest.

In these circumstances, these two CLECs have already received the discount benefits applicable to their purchases between November 15, 2000 and November 15, 2002 and should not be allowed to experience discounts on future purchases (during the 2-year period available to other CLECs under this Order) until they (McLeod and Eschelon) purchase services from Qwest for which the discount amounts (not available to them but computed in a tracker account) equal the amount of the contract termination payments received from Qwest.

V. OPPORTUNITY TO STAY PENALTY

Finally, the Commission's authority to order the foregoing three-steps to remedy Qwest's discriminatory action is clear. In addition, the monetary penalty assessed is appropriate based on the factors discussed in this Order. Nevertheless, practical public policy considerations incline the Commission to believe that the significant and warranted fine assessed in this Order should be coupled with the possibility of avoiding it if Qwest agrees to take and does take the appropriate three-step corrective (market-remediative) actions previously identified. This opportunity is provided to Qwest based on the Commission's preference for an outcome to this matter that restores the local competitive market in Minnesota most directly and efficiently.

VI. RIGHT TO REVIEW

A penalty imposed under Minn. Stat. § 237.462 shall not be payable sooner than 31 days after the Commission issues its final order assessing the penalty. The person subject to the penalty may appeal the Commission's penalty order under sections Minn. Stat. §§ 14.63 to 14.68. If the person does appeal the Commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal. Minn. Stat. § 237.462, subd. 5.

ORDER

1. Qwest shall pay a penalty of $25,955,000, calculated at the rate of $10,000 per penalty day for the Eschelon IV and McLeod III unfiled agreements, and at the rate of $2,500 per penalty day for the 10 other unfiled agreements.

2. Qwest shall make all 26 provisions of the unfiled agreements at issue in this matter available to the CLECs for the length of time they were offered to the CLEC signatory to the unfiled provision in question. That is, each CLEC will be able to determine which of the 26 provisions it wants to be part of its interconnection agreement with Qwest. Provided, however that Eschelon and McLeod's adoption of the discount provisions is subject to Order Paragraph 6 below.

3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services that the CLEC purchased from Qwest between November 15, 2000 and November 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs , tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a 24 month period starting on November 15, the day the Eschelon IV agreement became effective.

3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, $2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.

3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a $13 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.

3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a $16 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.

4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.

5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.

6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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APPENDIX F

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation

ISSUE DATE: June 18, 2002

DOCKET NO. P-421/C-01-391

ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS

PROCEDURAL HISTORY

On March 22, 2001, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint against Qwest Corporation (Qwest). In the complaint AT&T alleged that Qwest violated the terms of the AT&T/Qwest Interconnection Agreement (ICA) as well as state and federal law by failing to participate in a cooperative test of the unbundled network element platform (UNE-P) ordering and provisioning in Minnesota[1]. AT&T requested an expedited proceeding[2] and temporary relief.[3] AT&T also requested that Qwest be required to pay penalties under Minn. Stat. § 237.462, subd.1 through subd. 5.

On April 9, 2001, Qwest filed its response to AT&T's complaint. Qwest also filed a counterclaim that AT&T had violated federal law and the ICA by not negotiating in good faith. Qwest requested that penalties be imposed on AT&T pursuant to Minn. Stat. § 237.462, Subd. 2.

On April 17, 2001, the Department of Commerce (DOC) filed comments requesting an expedited hearing and supporting AT&T's request for temporary relief.

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[1] UNE-P is a method for a Competitive Local Exchange Carrier (CLEC) to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the Incumbent Local Exchange Carrier (ILEC) a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

[2] Pursuant to Minn. Stat. § 237.462 subd. 6.

[3] Pursuant to Minn. Stat. § 237.462 subd. 7.

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The Commission, in its Order of April 30, 2001,[4] among other things, granted certain temporary relief and referred the matter to the Office of Administrative Hearings for a contested case proceeding. The Commission deferred any decision on penalties until after receipt of the Administrative Law Judge's (ALJ's) report.

The April 30, 2001 Commission Order also set forth a 7-day period from the ALJ's report being submitted to the Commission for the parties to file exceptions. The Commission indicated that there were to be no replies to the exceptions.

Hearings were held by the ALJ on July 9-11 and July 26-27, 2001. Post-hearing briefs were filed by AT&T on August 31 and by Qwest and the DOC on September 4, 2001. Post-hearing reply briefs were filed September 21 by the DOC and September 24, 2001 by Qwest and AT&T. The record was closed October 1, 2001.

On February 25, 2002, the ALJ filed his Findings of Fact, Conclusions of Law, and Recommendation. The ALJ concluded, among other things, that Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under the ICA from September 14, 2000 to May 11, 2001. The ALJ also concluded that substantial penalties were appropriate and recommended assessing penalties against Qwest of $5,000 per day for 239 days, a total of $1,195.000.

Exceptions were filed by AT&T and Qwest on March 4, 2002.

On March 20, 2002, Qwest filed a Notice of Supplemental Authority with the Commission.

At the Commission's March 21, 2002, agenda meeting, the parties declined an opportunity to file replies to exceptions. The DOC moved to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority.

On March 27, 2002, AT&T filed its Reply to Qwest's Notice of Supplemental Filing.

On April 4, 2002 and April 9, 2002 these matters came before the Commission.

FINDINGS AND CONCLUSIONS

I. Summary of AT&T's Complaint

In its complaint against Qwest, AT&T claimed that Qwest violated the terms of the Qwest/AT&T ICA as well as state and federal law by failing to participate in a cooperative trial test of the unbundled network element platform (UNE-P) ordering and provisioning in Minneapolis. AT&T argued that Qwest's refusal to participate in this test would hinder AT&T's ability to determine whether it is feasible for it to offer residential local exchange services in Minnesota through the combination of Qwest's unbundled network elements (UNEs). Without the testing AT&T would not be in a position to offer residential service in Minnesota.

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[4] ORDER GRANTING TEMPORARY RELIEF AND NOTICE AND ORDER FOR HEARING, April 30, 2001.

The purpose of the AT&T UNE-P test was for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. AT&T's test trial was designed to test AT&T's procedures and processes needed to market local service via UNE-P and Qwest's ability to process and provision varying types of transactions and volumes of UNE-P orders.

II. Summary of the ALJ's Report

The ALJ addressed five issues:

- Did Qwest's position that AT&T intended to use AT&T's proposed UNE-P testing only for the purpose of opposing Qwest's Section 271 application, and not for market entry evaluation or preparation, relieve Qwest of its legal obligation to cooperate in such testing?

The ALJ concluded that it did not.

- Did Qwest knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with AT&T regarding UNE-P testing?

The ALJ concluded that it did, from mid-September 2000 to mid-May 2001.

- Did Qwest engage in anti-competitive behavior in its dealings with AT&T and the UNE-P testing?

The ALJ concluded that it did, from mid-September 2000 to mid-May 2001.

- Did AT&T knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with Qwest regarding UNE-P testing?

The ALJ concluded that it did not.

- Should a penalty be considered by the Commission?

The ALJ concluded that it should and recommended that a penalty in the amount of $5,000 per day for the period from September 14, 2000 until May 11, 2001 (239 days) totaling $1,195,000 be imposed upon Qwest.

More specifically, the ALJ concluded that:

> AT&T's UNE-P test request fit within the parameters established by § 14.1 of the ICA and was reasonable. Therefore, the ICA required Qwest to cooperate with AT&T in the conduct of the UNE-P test as requested.
>
> ALJ's Conclusions of Law, ¶ 8.
>
> ....
>
> Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under § 14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000 until May 11, 2001. Such action

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also constitutes a knowing and intentional refusal to provide a service, product, or facility to a telecommunications carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). Qwest is therefore subject to penalties under Minn. Stat. § 237.462, subd. 1(1) and (3).

Ibid. ¶ 13.

....

Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the ICA and under Section 251(c) of the Act...

Ibid. ¶ 14.

III. Commission Analysis and Action

A. Acceptance of the ALJ's Report

The Commission, after reviewing the record and the ALJ's Findings of Fact and Conclusions of Law and Recommendation as well as considering the exceptions brought by both parties adopts, and hereby incorporates the ALJ's Findings of Fact and Conclusions of Law and Recommendation with two exceptions: 1) the starting date of the penalty period and 2) the amount of the penalty, each of which will be discussed below.

The Commission recognizes that the ALJ, having heard the testimony and read and considered the documents and filings by the parties, was in the best position to determine the credibility of witnesses, the weight to be given the testimony and documents submitted and to make a reasoned decision based on the record. The Commission is persuaded that the ALJ's Findings of Fact and Conclusions of Law reasonably reflect the record, with the exceptions stated above.

B. The Date of the Violations

The Commission will alter the period of time that the ALJ found Qwest to be acting in bad faith. The ALJ found the period of violation to be from September 14, 2000, the date that AT&T informed Qwest of its intention to test the ordering and provisioning of the unbundled network element platform (UNE-P), until May 11, 2001, when Qwest stated it would do the testing requested by AT&T.

While hindsight and subsequent developments might raise questions about Qwest's good faith from the start, the Commission concludes that on balance the record does not demonstrate that Qwest was acting in bad faith from the very day it received AT&T's testing request. The testing request was comprehensive and complex and to begin testing various practical matters had to be resolved.

The Commission finds that there is ample evidence in the record to support Qwest's contention that during the period from September 14, 2000 through January 11, 2001, there were continuing discussions between AT&T and Qwest that were aimed at moving forward with the testing. There were numerous meetings and exchanges of information between AT&T and Qwest during this

time.[5] The Commission, after considering the series of communications and interchanges between Qwest and AT&T from September 14th through January 11, 2001, concludes that during this time the parties were actively engaged in making reasonable efforts to proceed with the testing.

The Commission, however, agrees with the ALJ that beginning January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.[6] Qwest's actions after the January 12, 2001 date were much more than business negotiations. Rather, it was clear that Qwest was intentionally putting numerous hurdles in the way of AT&T's moving forward with its testing program and that Qwest was acting in a manner that would preclude the testing that AT&T requested.

The evidence demonstrates that from at least January 12th, Qwest made numerous changes to the testing agreement after virtually all legitimate differences between the companies had been worked out. This clearly marked a change from give-and-take negotiating between the two companies to Qwest's acting in a deliberate manner that was designed to keep AT&T from doing what it believed was necessary to enter the market. For these reasons, the Commission finds that the period of a willful violation by Qwest began on January 12, 2001 and continued until May 11, 2001, when Qwest indicated its willingness to do the testing as specified by AT&T.

C. Reserving Judgment on the Amount of Penalty

The ALJ made a specific recommendation of the amount of the penalty to be assessed Qwest. The Commission has accepted the ALJ's Findings of Fact and Conclusions of Law (with the two exceptions stated above) and recognizes that Qwest is subject to penalties under Minnesota statutes.[7] The Commission, however, believes that before setting any penalty amount, it requires more information from the parties.

For this reason, the Commission will give the parties an opportunity to supplement the record on the matter of penalties. The Commission, at the April 9, 2002 Agenda meeting, directed the parties to supplement the record on the following items, set forth in Minn. Stat. § 237.462 subd. 2(b):

(2) the gravity of the violation, including the harm to customers or competitors;
(5) the economic benefit gained by the person committing the violation;
(6) any corrective action taken or planned by the person committing the violation;
(9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.

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[5] Findings of fact 41-69, *Findings of Fact, Conclusions of Law and Recommendation* of the ALJ, February 22, 2002.

[6] Ibid. Finding of fact 72.

[7] Minn. Stat. § 237.462, Subd. 2, provides that the Commission may assess a penalty between $100 and $10,000 per day after considering factors set forth in § 237.462 Subd. 2(b)(1) through (9).

Further the Commission directed parties to comment on the issues highlighted by Commissioner Garvey in a document distributed at the April 9, 2002 hearing.[8] The parties were given three weeks from the date of the Commission meeting (April 9, 2002) to file their comments and replies.

IV. Exceptions by the Parties to the ALJ Report

A. AT&T

AT&T took exception to the amount of fine which the ALJ recommended be imposed against Qwest. AT&T argued that the maximum penalty of $10,000 per day (for the 239 day period set forth by the ALJ) should be imposed upon Qwest in order to punish Qwest's misconduct and deter future anticompetitive behavior to the fullest extent.

B. Qwest

Qwest claimed that there were four fundamental flaws in the ALJ's findings of fact:

a. There was no support in the record for the proposition that Qwest impeded AT&T's UNE-P entry into the Minnesota market. Qwest argued that the ALJ erred by making findings including: that Qwest outright refused to test, and that Qwest's standardized testing was insufficient for market entry purposes. Further the ALJ made omissions by not including evidence that AT&T refused to conduct any test other than the one it formulated, and that AT&T would have delayed the test to coincide with the Regional Oversight Committee (ROC) tests so results could be used for 271 advocacy purposes.[9]

b. The test and the complaint have been premised on AT&T's professed interest in entering the local market by offering UNE-P. Qwest was not allowed any discovery into whether that claim was legitimate. Qwest was not allowed to offer evidence that AT&T's claimed interest in market entry was a sham.

c. Qwest was not allowed to call Steve Davis as a witness to rebut AT&T's testimony regarding Davis' statements, actions and mind set. Qwest argued that this error was sufficiently prejudicial to taint the proceedings and subsequent findings. Further, Qwest argued, the ALJ substituted his own assumptions of what Davis said, did and thought, rather than hearing the testimony.

d. The ALJ erred by ignoring Qwest's claim of bad faith against AT&T. The ALJ report focuses on allegations raised by AT&T, and dismisses Qwest's arguments, without any finding of fact, in a single conclusory paragraph.

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[8] Paragraph M of *Thoughts by Commissioner Edward Garvey Regarding the UNE-P Complaint of AT&T Against Qwest, P-421/-01-391.*

[9] Section 271 of the 1996 federal Telecommunications Act (the Act) sets forth the conditions to be met by Regional Bell Operating Companies (RBOCs) in order to enter interLATA long distance markets.

Qwest also claimed that AT&T and Qwest had reached a settlement and that the ALJ erred in ruling that it had been withdrawn.

Further, Qwest objected to the penalty recommended by the ALJ.

V. Qwest's Exceptions

A. Qwest's Claim that AT&T's Testing Request was a Sham

1. Qwest's Position

Qwest argued that the testing negotiations were tainted by AT&T's false assertion that the testing it requested was intended to lay the groundwork for AT&T's entry into the market. Qwest argued that it was prejudiced by its being unable to inquire into the legitimacy of AT&T's claim in this regard.

Further, Qwest argued that the ICA does not require Qwest to conduct any test that AT&T demands. Rather, Qwest argued that testing under Qwest's standard processes, supplemented as necessary by data provided by the Regional Oversight Committee- Operational Support System (ROC-OSS) testing could meet all of the objectives stated by AT&T for market entry.

2. AT&T

At&T argued that it was not required to reveal to Qwest its business plans. It asserted that it had entered the UNE-P market in a number of states and that Minnesota had been identified by AT&T's Vice President as a promising market for UNE-P. It argued that there are numerous factors that enter into a company's decision to enter a market and it had the right to test to determine whether to enter this particular market.

3. ALJ's Determination

Qwest had requested discovery of AT&T's business plans in order to assess AT&T's motives for conducting the test and its need to do so. The ALJ ruled that discovery of business plans would not be permitted. The ALJ did, however, allow the deposition of one technical employee at AT&T regarding the issue of why Qwest's 1-2-3 test[10] would not be adequate for AT&T's purposes.

The ALJ found that AT&T acted in good faith in requesting the UNE-P test. The ALJ found that AT&T's legitimate interests and business intent could be found in AT&T's status as a large communications provider, its entry using UNE-P in other states, its projections of 1,000 UNE-P orders per month to Qwest, and AT&T's representations to the Commission and the ALJ that it intended to enter the market in a substantial way if the test proved successful.[11]

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[10] Qwest's standard certification testing.

[11] ALJ's First Prehearing Order, ¶ 8.

Further, the ALJ found that whether AT&T intended to use the results in Qwest's 271 hearings was irrelevant given that the1996 Telecommunications Act[12] (the Act) specifically established the 271 process as a mechanism to insure that an ILEC is meeting all the requirements of the Act before the FCC allows the ILEC to enter the long distance market. AT&T therefore could use a negative test result to obtain corrections by Qwest, and, if such corrections were not made, could use the results in a 271 proceeding to show Qwest's lack of compliance.[13]

4. Commission Action

The Commission concurs with, accepts, and adopts the ALJ's findings and conclusions on these issues. They are well-developed, thoughtful, and supported by the weight of the evidence.

Many of Qwest's arguments go to the credibility of the witnesses' testimony and the weight given to testimony and documentation submitted. The Commission will not second guess the ALJ's judgment in these matters. The ALJ was in the best position to determine issues of credibility of witnesses and the Commission will defer to the ALJ's determinations.

As the ALJ pointed out, even if AT&T's state of mind were relevant to Qwest's obligation to comply with a testing request within AT&T's contract rights – which is doubtful – there is no evidence that AT&T's testing request was a sham. AT&T's claim that it was investigating the possibility of using UNE-P to enter the market in Minnesota was reasonable on its face and corroborated by the Company's use of UNE-P to enter the market in other states. Without tangible evidence of bad faith, there were no reasonable grounds to grant AT&T's competitor, Qwest, the requested access to AT&T's business plans.

In short, the Commission agrees with the ALJ that AT&T, under the ICA, had the right to test and Qwest had an obligation to cooperate with AT&T in this. The ALJ properly allowed Qwest to conduct discovery into the question of the reasonableness of the test. Further, the Commission agrees that Qwest's obligation to cooperate in AT&T's request should not be dependent on Qwest's evaluation of the reason for the testing.

B. The Testimony of Steve Davis[14]

1. Qwest

Qwest argued that its case was substantially impaired because Mr. Davis was not allowed to testify. It argued that the ALJ's Findings contain numerous substantive mentions of Mr. Davis, each with an inference of improper intent, and that it was prejudicial not to allow Mr. Davis to testify.

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[12] Pub.L.No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

[13] See footnote 11, supra and ALJ's Findings of Fact, ¶ 112.

[14] Qwest Senior Vice President for Policy and Law.

2. AT&T

At&T argued that the Findings of Fact by the ALJ were supported by the testimony of Qwest's own witness, Chuck Ward, and the testimony of AT&T's witness (Tom Pelto) on cross examination.

Further, AT&T pointed out that Steve Davis was not presented by Qwest as a witness in its case in chief and his name was not provided to AT&T in response to a discovery request by AT&T to identify all individuals that were involved in a decision not to engage in testing. In response to Qwest's request to offer Mr. Davis's testimony as rebuttal testimony, AT&T argued that Mr. Davis's testimony was not proper rebuttal testimony because it was rebuttal testimony of Qwest's own witness' testimony.

3. ALJ's Determination

The ALJ was persuaded by the arguments of the DOC and AT&T that this was not appropriate rebuttal and would add nothing substantive to the record.

4. Commission Action

The Commission is persuaded that the ALJ's Findings of Fact (as related to Qwest's position) are supported by the testimony of Qwest's witness Chuck Ward and the testimony of AT&T's witness (Tom Pelto). The ALJ in determining that Mr. Davis would not be allowed to testify was persuaded that Mr. Davis' rebuttal testimony would be for the purpose of rebuttal of the testimony of another Qwest witness and that Mr. Davis' testimony would add nothing new to the record. The Commission, after reviewing the record, agrees.

As further support for its position, the Commission recognizes that Qwest had made the decision not to provide Davis' name as a person involved in the decision not to engage in AT&T's requested testing. Further, Qwest had made the decision that Mr. Davis would not testify in Qwest's case in chief and had taken steps to prevent Davis from testifying, except on rebuttal.

C. Qwest's Claim that there was a Settlement Agreement

1. Background

Qwest and AT&T entered into a Memorandum of Understanding (MOU) as well as an Initial Testing Plan of UNE-P on May 8, 2001 that provided, among other things, a testing plan that was agreeable to both parties and giving the DOC "... the opportunity to review, comment upon and sign the Final Settlement Agreement...."

The MOU also provided that upon completion of the testing each party would dismiss its claims with prejudice.

2. Position of the Parties

a. Qwest

Qwest argued that a May 8, 2001 Memorandum of Understanding (MOU) entered into by Qwest and AT&T was a settlement of this matter. Qwest argued that the ALJ's ruling that the parties had withdrawn and abandoned the agreement was in error when either of the parties still had the right, under the terms of the agreement, to take the matter to the Commission.

Qwest moved the ALJ to certify the ruling on whether the MOU was enforceable to the Commission.

b. AT&T

AT&T argued that there was no settlement agreement, only a MOU that contemplated a final settlement agreement. Terms and conditions for a settlement were never agreed on.

c. DOC

The DOC refused to agree to the terms of the MOU because the DOC required that there be an admission by Qwest of anti-competitive behavior and that penalties should be assessed against Qwest.

3. ALJ's Determination

The ALJ denied Qwest's motion to certify the issue of the enforceability of the MOU to the Commission[15] and found that any settlement agreement between Qwest and AT&T had been withdrawn and abandoned by the parties.[16] The ALJ found that when counsel for the DOC stated its position regarding the MOU, Qwest's counsel announced that it was an all or nothing deal and therefore the agreement was off.[17]

4. Commission Action

The Commission supports and agrees with the ALJ's finding that the MOU was abandoned by the parties when Qwest indicated it could not accept the DOC's terms and it was an all or nothing deal.

VI. The DOC's Motion to Exclude Supplementary Evidence

A. Qwest's Notice of Supplementary Authority

Qwest stated that the purpose of the Notice of Supplemental Authority was to bring to the Commission's attention pertinent decisions and recommendations from other jurisdictions that

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[15] ALJ's Second Prehearing Order, June 28, 2001.

[16] ALJ's Findings of Fact, ¶ 114.

[17] ALJ's First Prehearing Order ¶ 12, June 6, 2001.

Qwest believes contradict the ALJ's findings on the issues raised before the Commission: 1) whether Qwest was obligated to provide the testing requested by AT&T and 2) whether Qwest's concerns regarding the purpose and method of that test were raised in good faith.

On March 20, 2002, Qwest submitted a report dated August 20, 2001, and a subsequent report dated October 22, 2001, both issued by the facilitator appointed by seven of the states considering Qwest's application to provide long distance services pursuant to section 271 (Antonuk Report). Qwest also submitted a December 21, 2001 Report of the Oregon Public Utilities Commission. Qwest argued that the facilitator rejected the very arguments that AT&T raised before this Commission and also rejected the argument that Qwest acted in bad faith.

B. Position of the Parties

1. AT&T

AT&T argued that Qwest's Notice of Supplemental Authority should be stricken from the record because it violated the procedural schedule in this docket, it improperly attempts to introduce new factual arguments into the record, and it is irrelevant to this proceeding.

Exceptions to the ALJ's report were to be filed within seven days of its submission to the Commission,[18] therefore, AT&T argued, Qwest's March 20, 2002 filing was late.

Further, AT&T argued, the Antonuk Report addresses a different issue and is irrelevant. The Antonuk Report addresses the question of the adequacy of Qwest's SGAT for Section 271 purposes. The issue in the current case arises under a Minnesota Commission-approved Interconnection Agreement and addresses the question of obligations arising under the Interconnection Agreement.

2. DOC

At the March 21, 2002 Commission Agenda meeting the DOC made a motion to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority.

C. Commission Action

The Commission finds that the Notice of Supplemental Authority submitted by Qwest was not only untimely but addresses the issue of the adequacy of Qwest's SGAT for Section 271 purposes, an issue that is not relevant herein. The relevant issue herein arises under a Commission-approved Interconnection Agreement and addresses the question of the obligations arising therein. Because of its untimeliness and its lack of relevance, the Notice of Supplemental Authority submitted by Qwest and the parties responses thereto will not be included in the record of this proceeding.

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[18] The ALJ's Findings of Fact, Conclusions of Law and Recommendation was received by the Commission on February 25, 2002.

ORDER

1. The Commission adopts and incorporates herein the ALJ's report consisting of the ALJ's Findings of Fact, Conclusions of Law and Recommendation with the exception of the starting date (of the violation) as discussed herein and the amount of penalty to be assessed, which is reserved for further judgment.

2. The Commission finds a knowing, intentional and material violation on the part of Qwest starting January 12, 2001 and ending May 11, 2001.

3. The DOC's motion to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority is granted. Qwest's Notice of Supplemental Authority and parties' responses to said notice shall not be included in the record of this proceeding.

4. Qwest's Counterclaim against AT&T is hereby dismissed with prejudice.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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APPENDIX G

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation

ISSUE DATE: June 18, 2002

DOCKET NO. P-421/C-01-391

ORDER ASSESSING PENALTIES

PROCEDURAL HISTORY

On the same date herein the Commission issued its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS in which the Commission accepted and adopted the Administrative Law Judge's (ALJ's) conclusion that Qwest knowingly and intentionally violated its Interconnection Agreement with AT&T as well as state and federal law in its response to AT&T's request for testing of Qwest's network.

In that Order, the Commission modified the ALJ's findings as to the period of the violation and found a knowing and intentional violation on the part of Qwest for the period from January 12, 2001 through May 11, 2001. Further, the Commission did not accept the ALJ's recommendation as to the amount of penalty to be assessed but reserved judgment on this issue.

At the hearing on April 4, continued on April 9, 2002, the Commission directed the parties to supplement the record on certain specific items related to penalties set forth in Minn. Stat. § 237.462 subd. 2(b) as well as comment on certain questions raised by Commissioner Garvey.

On April 19, 2002, comments on penalties were filed by the Department of Commerce (DOC), AT&T and Qwest.

On April 19, 2002, Eschelon Telecom, Inc. (Eschelon) submitted an affidavit of J. Jeffrey Oxley.

On April 30, 2002, DOC, AT&T and Qwest filed reply comments.

This matter came before the Commission on May 14, 2002.

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FINDINGS AND CONCLUSIONS

The only issue addressed in this Order is the assessment of penalties.

I. The Legal Standard

Minn. Stat. § 237.462, Subd 2 provides that the Commission may assess a penalty of between $100 and $10,000 per day for each violation.

Minn, Stat. § 237.462, Subd. 2(b) directs the Commission, in determining the amount of penalty, to consider:

> (1) the willfulness or intent of the violation;
>
> (2) the gravity of the violation, including the harm to customers or competitors;
>
> (3) the history of past violations, including the gravity of past violations, similarity of previous violations to the current violation to be penalized, number of previous violations, the response of the person to the most recent previous violation identified, and the time lapsed since the last violation;
>
> (4) the number of violations;
>
> (5) the economic benefit gained by the person committing the violation;
>
> (6) any corrective action taken or planned by the person committing the violation;
>
> (7) the annual revenue and assets of the company committing the violation, including the assets and revenue of any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company;
>
> (8) the financial ability of the company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, to pay the penalty; and
>
> (9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.

Minn. Stat. § 237.462 also provides:

> Subd. 3. Burden of proof. The commission may not assess a penalty under this section unless the record in the proceeding establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in subdivision 2.

Subd. 4. Contents of order. An order assessing an administrative penalty under this section shall include:

(1) a concise statement of the facts alleged to constitute a violation;

(2) a reference to the section of the statute, rule, or order that has been violated;

(3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and

(4) a statement of the person's right to review of the order.

Subd. 5. Penalty stayed. A penalty imposed under this section shall not be payable sooner than 31 days after the commission issues its final order assessing the penalty. The person subject to the penalty may appeal the commission's penalty order under sections 14.63 to 14.68. If the person does appeal the commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal.

II. The Violation

A. Factual Summary[1]

On or about September 14, 2000, AT&T informed Qwest that AT&T would be making a request for UNE-P testing in Minnesota. The purpose of the AT&T UNE-P[2] testing was for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. The information gained from this testing and the problems corrected would be used by AT&T in evaluating and making a UNE-P offering in Minnesota.

During the period from mid-September 2000 until January 11, 2001, there were continuing discussions between AT&T and Qwest that were aimed at moving forward with the testing. Beginning January 12, 2002, however, Qwest took deliberate steps to put unnecessary hurdles and

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[1] The Commission adopted the February 22, 2002, Findings of Fact and Conclusions of Law of the ALJ with two exceptions as set forth in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

[2] UNE-P is a method for a Competitive Local Exchange Carrier (CLEC) to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the Incumbent Local Exchange Carrier (ILEC) a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

delays into moving forward with the testing process. Qwest's actions had the effect of precluding the testing that AT&T required. Finally, on May 11, 2001, Qwest agreed to proceed with the testing plan as specified by AT&T.

B. Law and Statutes Violated

In the period between January 12, 2001 and May 11, 2001, Qwest knowingly and intentionally violated:

1) Minn. Stat. 237.121(a)(4) which prohibits a telephone company from refusing to provide a service, product, or facility to a telecommunications carrier in accordance with a contract;

2) Minn. Stat. § 237.121 (a)(1) which prohibits a telephone company from failing to disclose necessary information;

3) Section 14.1 of the Interconnection Agreement between AT&T and Qwest setting forth Qwest's obligation to engage in cooperative testing; and

4) the Interconnection Agreement and Section 251 (c)(1) of the 1996 Telecommunications Act (the Act)[3] requiring Qwest and AT&T to act in good faith.

C. The Penalty Imposed

The Commission, in this Order, will impose a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001. The factors upon which this penalty is based will be discussed below.

D. Right to Review

The parties have a right to judicial review of the final decision of the Commission under Minn. Stat. § 237.25 as well as Minn. Stat. § § 14.63 to 14.68. See Minn. Stat § 237.462, subd. 5. The parties may also ask the Commission for reconsideration of its final decision under Minn. Rules Part 7829.3000.

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[3] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

III. Factors Considered by the ALJ in Assessing a Penalty

The ALJ found that:[4]

1) The violations were knowing and intentional.

2) The violations were serious in that Qwest's conduct delayed by several months AT&T's ability to enter the local service market using UNE-P. This harmed AT&T financially and also harmed Minnesota consumers by delaying significant competition in the local service market.

3) There was one significant violation, a continuing pattern of conduct, and several lesser individual violations consistent with that pattern.

4) Qwest's conduct was for the purpose of protecting its entry into the long-distance market through the Section 271[5] process. Long-distance will provide very substantial revenue to Qwest.

5) Qwest ultimately agreed to cooperate in AT&T's UNE-P test, but only after AT&T had initiated this complaint proceeding.

6) Qwest has enormous assets, but is suffering revenue problems in the current economy. It has the financial ability to pay significant penalties.

7) Qwest's actions would be appropriate in a competitive market. But this is a regulated market where Qwest's actions are subject to the Telecommunications Act of 1996 (the Act) and state law. Its actions were anti-competitive and cannot be condoned under the Act and state law.

ALJ's Conclusions of Law, ¶ 15.

IV. The Parties' Positions Regarding Penalties

A. DOC

1. Willfulness of the Violation

The DOC stated that, based on the Findings of Fact and Conclusions of the ALJ as adopted by the Commission, Qwest's actions were willful and intentional with regards to the AT&T test request. It argued that Qwest's conduct was the very type of anti-competitive behavior that the Commission should punish. It was the DOC's opinion that the maximum penalty could be assessed based on this factor alone.

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[4] Adopted by the Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

[5] Section 271 of the 1996 federal Telecommunications Act sets forth the conditions to be met by Regional Bell Operating Companies (RBOCs) in order to enter interLATA long distance markets.

2. Gravity of Violation/Harm to Customers or Competitors

The DOC recognized that the harm to consumers and to competitors by Qwest's behavior is not easily quantifiable. Even though AT&T ultimately got the testing it requested, the DOC argued that the anti-competitive behavior itself is per se harmful to competition, and therefore to consumers, and should be recognized.

3. History of Past Violations

The DOC believes that the Commission need not focus on this factor in assessing a penalty in this case. The DOC argued that the Commission could assess the maximum penalty without a record of past violations.

4. The Number of Violations

The DOC argued that there was one violation that was not only willful and intentional but went on for 120 days. The statute provides for a per day/per violation assessment of penalties and the DOC argued that the maximum penalty for one violation should be assessed against Qwest for the time period of anti-competitive behavior adopted by the Commission.

5. Economic Benefit to Violating Party

The DOC argued that the reason Qwest would not conduct the test requested by AT&T was to protect its own economic interests, specifically with regard to its 271 agenda. It was not going to conduct a test for AT&T that provided AT&T additional data that could be used to oppose Qwest's 271 agenda. The DOC argued that when assessing penalties the Commission should rely heavily on the fact that Qwest was attempting to protect its own economic interests at the expense of its obligation to open its network to competitors.

6. Corrective Action by the Violator

The DOC argued that although Qwest did eventually agree to conduct the test, there was a cost to AT&T in terms of time and effort. The DOC viewed Qwest's agreement to conduct the test in May of 2001 as only thinly "corrective."

7. Financial Ability to Pay the Penalty

The DOC argued that Qwest should pay the maximum penalty under the law. The ALJ's findings that Qwest had "the financial ability to pay significant penalties" are well supported in the record, the DOC argued, and should be considered by the Commission in assessing the maximum penalty.

8. Other Factors that Justice May Require

The DOC stated that Qwest's tactics in this docket warrant consideration, under this factor, by the Commission for penalty assessment. It argued that Qwest created false premises for rejecting the AT&T request, failed to disclose a principal decision maker, Mr. Davis, and failed to disclose relevant e-mails from Mr. Davis in response to AT&T's discovery requests. The DOC argued that these actions demonstrated an intent to keep relevant information from the Commission. Such actions, the DOC argued, compromise the integrity of the Commission's complaint and hearing process and should be given considerable weight in assessing a penalty.

B. AT&T

AT&T requested that Qwest be fined the maximum penalty of $10,000 per day for the 120 day period set forth by the Commission. AT&T stated it supported the DOC's position that the record already developed in this case is sufficient to enable the Commission to determine a penalty amount based on the relevant statutory factors. AT&T had the following comments on the statutory factors to be considered:

1. The Gravity of the Violation

AT&T stated that the company believed that the record compiled by the ALJ fully supports a maximum penalty against Qwest. It argued that Qwest's offenses merit the maximum penalty because Qwest has broken the most fundamental prerequisites of competition: 1) allowing testing of systems that support interconnection; 2) negotiating in good faith; and 3) disclosing information that makes competitive local service possible.

2. Economic Benefit Gained

AT&T argued that Qwest put its 271 initiative ahead of everything else because it has a lot to gain by doing so. Qwest stands to gain enormous revenue in the long distance market if its 271 initiative succeeds.

3. Corrective Action Taken

Other than agreeing to do the testing, Qwest has not taken any action to correct its behavior.

4. The Size of Qwest's Revenue and Assets

AT&T stated that the purpose of the statute is to punish and deter violations of state law. Given Qwest's enormous revenue and assets only the maximum penalty can act as a deterrent to Qwest. This factor alone calls for a severe penalty.

5. Qwest Could be Penalized for Multiple Violations

AT&T argued that there were at least three discrete violations which warrant punishment under the statute: 1) willfully refusing to perform cooperative testing 2) violating its duty of good faith, and 3) refusing to disclose information that would allow AT&T to compete. Because there were three discrete violations, AT&T argued that Qwest could be assessed the maximum for each violation. Fining Qwest $10,000 per day for a single violation for the period set forth is therefore not truly the maximum penalty and would be generous to Qwest in these circumstances.

C. Qwest

Qwest stated that Minnesota law provides that penalties may be assessed and argued that given the record in this case, the Commission should use its discretion and impose no penalty.

1. The Gravity of the Violation

Qwest stated that Minn. Stat. § 237.462 requires an assessment of whether there has been harm to the competitor or to customers. Qwest argued that AT&T was not adversely affected by Qwest's actions because AT&T was neither willing nor able to conduct UNE-P testing during the period of time Qwest was purportedly delaying the process.

Qwest may not have immediately assented to the unique style of testing that AT&T was demanding, but that does not rise to the level of a grave violation justifying the fine proposed.

Qwest argued that there has been no harm to consumers in that the UNE-P market in Minnesota today is the same as before AT&T completed its testing. It is the same as it would have been if AT&T conducted the UNE-P test in January, 2001 or even September, 2000. Because there has been no harm to consumers, no penalty should be assessed under this factor.

2. Corrective Action Taken

Qwest argued that once the Commission's preference became clear, Qwest worked diligently to perform the requested testing.

3. Economic Benefit

Qwest argued that there is no evidence in the record to support AT&T's implication that Qwest's position on the testing accelerated the Section 271 approval process and therefore Qwest has realized some economic benefit.

4. Other Factors

Qwest argued that the fact that six other state commissions have validated the very approach that Qwest took in this instance is powerful "other evidence" that Qwest should not be penalized for attempting to ensure that AT&T had some reasonable purpose for the test.

V. Commission Action

The Commission, in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS accepted and adopted the ALJ's Findings of Fact and Conclusions of Law. In accepting the ALJ'S report, the Commission adopted, among other things, the conclusion that Qwest violated terms of the interconnection agreement with AT&T as well as state and federal law. The Commission concurs with the ALJ and finds that such violations of law warrant a penalty.

The Commission has reviewed the record, including the filings by the parties specifically on penalty issues, in light of the factors the statute directs it to consider in setting penalty amounts. Minn. Stat. § 237.462, subd.2. Having completed this review, the Commission will assess a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001. The Commission bases this penalty on the following considerations:

A. Willfulness or Intent of the Violation

The Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS adopted, among other things, the ALJ's conclusions that Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under the Interconnection Agreement with AT&T by its refusal to conduct the UNE-P testing requested by AT&T. The ALJ specifically found that beginning January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.[6]

The ALJ also found that such action by Qwest constituted a knowing and intentional refusal to provide a service, product or facility to a telecommunication carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). The Commission agrees with the ALJ that the violations by Qwest were knowing and intentional violations of law.

The ALJ also concluded that Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement by the following conduct: a) creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based on Qwest's retail business interests; b) imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow...; and c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.[7] The Commission agrees with the ALJ that Qwest actions were in bad faith.

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[6] See ALJ's Findings of Fact and Conclusions of Law, Finding No. 72.

[7] See id. Conclusions of Law ¶ 14.

Further, the ALJ stated, and the Commission agrees, that Qwest did not fail to act in good faith when it attempted to determine for itself its obligations under the interconnection agreement. However, Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using that testing for market entry was not simply a mistaken interpretation of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications.[8] The Commission recognizes that this was a further example of bad faith on Qwest's part.

B. Gravity of the Violation, Including the Harm to Customers or Competitors

The violation was grave in that it goes to the very heart of competition, which is facilitating network access by competitors. Qwest's conduct delayed AT&T's ability to enter the local market by several months, thereby causing harm to consumers by delaying competition in the local service market. Qwest's actions also caused financial harm to AT&T by delaying its market entry and forcing AT&T to use time and resources to bring the matter to the Commission for resolution. Finally, the competitive market was also harmed. Qwest's delaying the testing and causing difficulty for AT&T to get access to crucial pre-entry information that did not conform to what Qwest was willing to offer has the effect of discouraging others from entering the market. Qwest's obstructionist behavior toward AT&T presumably raised the costs of UNE-P entry in the minds of other potential competitors, discouraging investment in the Minnesota market.

Although it is clear that there was harm caused by Qwest's conduct, the exact amount of harm is not readily quantifiable.

C. History of Past Violations and Related Factors

This is the first time the Commission has ruled on the merits that Qwest's conduct warrants a penalty under the competitive enforcement statute. This militates against assessing the maximum penalty. The Commission agrees with the parties that since other issues regarding Qwest's behavior are currently being addressed in current contested case proceedings under the jurisdiction of the Office of Administrative Hearings, the Commission need not focus on those issues in this proceeding.

D. Number of Violations

There was one significant continuing violation arising out of one set of facts continuing over an extended period of time. Such a situation merits a significant penalty. The Commission agrees with the ALJ's recommendation to consider a penalty for only the one significant violation involving the bad faith pattern of conduct.

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[8] See id. Conclusions of Law ¶ 12.

E. Economic Benefit Resulting from the Violation

While the degree to which Qwest benefitted economically from its bad faith pattern of conduct is undetermined, Qwest provides an essential service to a largely captive market-it clearly benefits economically each time a competitor's market entry is delayed or prevented. Equally clearly, it benefits whenever it can increase the entry costs of its would-be competitors. Further the ALJ found, and the Commission concurs, that this violation was motivated at least in part by Qwest's economic interest in offering long distance service in Minnesota and other states in which it is the incumbent local carrier. Under federal law, it cannot offer long distance in those states unless its interconnection practices and procedures meet certain standards. The testing requested by AT&T carried the risk of demonstrating that Qwest was not meeting those standards. The violation at issue, therefore, was both economically motivated and more than likely resulted in economic gain for Qwest.

F. Attempts to Correct Violation

Qwest did ultimately comply with AT&T's testing request. This could be a mitigating factor in assessing penalties. However, there was no evidence presented by Qwest that it would do anything significantly different in the future if faced with a similar request. There was nothing to show that there was any change in Qwest's attitude or approach.

Qwest did eventually comply with AT&T's request. However, this was due to Qwest's recognition that compliance would be required. Since Qwest did not comply until it had become clear that the Commission would require compliance, and there was no evidence of a change in attitude or approach, significant penalties remain appropriate.

G. Annual Revenue/Financial Ability to Pay the Penalty

The Commission agrees with the ALJ that Qwest has significant financial assets and has the financial ability to pay any penalties assessed.

H. Other Factors that Justice May Require

Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not an appropriate role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that wanted information that Qwest deemed was not necessary for it to have.

The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was "bogus" because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In conclusion, the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done. However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of $7500 per day for the period beginning January 12, 2001 through May 11, 2001.

VI. Affidavit filed by Eschelon

A. Background

On April 19, 2002, in response to the Commission's request for comments on specific factors related to the assessment of penalties, Eschelon[9] submitted an Affidavit of Jeffrey Oxley (the Affidavit). The purpose of the Affidavit was for Mr. Oxley to testify to facts that show harm to Eschelon, other competitive local exchange carriers, (CLECs), and customers by Qwest's delaying AT&T's UNE-P test.

The issue addressed by the Commission is whether the Affidavit should be entered into the record in this proceeding.

B. Position of Qwest

Qwest was the only party to comment on the issue of admissibility of the Affidavit.

Qwest viewed Eschelon's filing as an attempt by Eschelon to bring in completely new and misleading facts. Qwest argued that this was procedurally improper and denied Qwest the opportunity to develop facts in rebuttal. It argued that Eschelon's contentions will serve only to confuse the issue.

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[9] Eschelon is not a party in this proceeding and has not participated in this proceeding prior to this submission.

Qwest argued that Eschelon was seeking to raise its own independent claims against Qwest which involve matters wholly distinct from the substance of the matter currently before the Commission. This was an attempt by Eschelon to circumvent procedural safeguards and the submission should be declined.

Further, Qwest argued, if the Affidavit were to be admitted, Qwest should be allowed to conduct reasonable discovery into the claims made and it should be permitted to conduct cross examination of the affiant.

C. Commission Action

The Commission will not allow the Affidavit filed by Eschelon, nor any responses to that filing, into the record. The filing addresses Eschelon's own experience with Qwest under provisions of an interconnection agreement between Eschelon and Qwest and is not relevant to the matter herein. Further, it attempts to introduce into the record new factual arguments which have not been developed under the procedural protections available in an adversarial proceeding. For these reasons the Affidavit will not be admitted into the record.

ORDER

1. The Affidavit of J. Jeffrey Oxley filed by Eschelon, and any responses to that filing, are hereby excluded from the record in this case.

2. Qwest shall pay a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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APPENDIX H

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing

ISSUE DATE: July 3, 2002

DOCKET NO. P-421/C-01-1896

ORDER RESOLVING COMPLAINT, SETTING COLLOCATION PRICES, AND SETTING PROCEDURAL SCHEDULE

PROCEDURAL HISTORY

On December 26, 2001, Onvoy Inc. (Onvoy) filed a complaint against Qwest Corporation (Qwest). Onvoy alleged that Qwest failed to properly bill Onvoy for the costs of cageless and caged collocation and to promptly provision and accurately bill Onvoy with respect to Qwest's provision of Local Interconnection Service (LIS) trunks. Onvoy requested that the Commission conduct an expedited hearing pursuant to Minn. Stat. §237.462, subd. 6 to resolve its claims against Qwest amounting to $931,674.19.

Qwest filed an answer on January 11, 2002 and included a counterclaim alleging Onvoy owes Qwest for unpaid charges related to Onvoy's collocation and LIS trunk orders.

On February 11, 2002, the Commission issued its NOTICE AND ORDER FOR HEARING. In that order, the Commission found that it had jurisdiction over this matter, and referred it to an administrative law judge (ALJ) for a contested case proceeding pursuant to Minn. Stat. § 237.081, subd. 2.

Following hearings and briefings, ALJ Kathleen D. Sheehy filed her Findings of Facts, Conclusions of Law and Recommendations (ALJ Report) on April 12, 2002.

On May 2, 2002, Onvoy and Qwest filed exceptions to the ALJ Report. Onvoy filed replies on May 13; Qwest on May 15.

On May 29, 2002, Onvoy filed comment regarding alleged discrepancies between the positions argued by Qwest in the current docket and in a concurrent docket reconsidering the Commission-approved prices of Qwest's unbundled network elements (UNEs).
The Commission met to consider this matter on May 30, 2002. At that hearing, Qwest informed the Commission that it had filed a response to Onvoy's May 29 filing.

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FINDINGS AND CONCLUSIONS

I. BACKGROUND

The Telecommunications Act of 1996 seeks to promote competition in the local exchange telephone market. To this end, the Act directs an incumbent local telephone company –

> (1) to permit competing firms to interconnect with its system, including permitting a competitor to locate plant within the incumbent's offices (collocation),
>
> (2) to permit a competitor to purchase services from the incumbent at wholesale rates for resale, and
>
> (3) to permit a competitor to purchase the use of the incumbent's UNEs at "rates, terms and conditions that are just, reasonable and nondiscriminatory...." 47 U.S.C. § 251(c).

The Act also directs incumbents to negotiate in good faith regarding these obligations. 47 U.S.C. § 251(c)(1). Under the terms of the Act, a competitor desiring to provide local exchange service can seek agreements with an incumbent related to interconnection with the incumbent's network, the purchase of finished services for resale, and the purchase of the incumbent's UNEs. 47 U.S.C. §§ 251(c), 252(a). If the incumbent and the competitor cannot reach an agreement within the time frame specified in the Act, either party may petition the state commission to resolve the dispute. 47 U.S.C. § 252(b).

On December 2, 1996, the Commission initiated the "Generic Cost Docket" to establish appropriate prices for UNEs and interconnection with US West Communication, Inc. (US West), predecessor to Qwest.[1]

On November 3, 1999, MEANS Communications Corporation, predecessor to Onvoy, entered into an interconnection agreement with US West. The agreement provides for payments based initially on interim rates, with the understanding that parties would retroactively bill each other ("true up") based on permanent rates established in subsequent Commission orders.

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[1] *In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (Generic Cost Docket).

On March 10, 1999, Onvoy requested to collocate its equipment within a Qwest office, and asked that the area be fenced-off, or "caged," in order to provide security. On October 1, 1999, Onvoy made ten requests to collocate additional equipment, but did not request cages. Onvoy also requested LIS trunks, which consist of cables connecting Onvoy's facilities collocated within Qwest's offices to Onvoy's facilities located beyond Qwest's offices.

On June 22, 2000, the Generic Cost Docket closed when the time for filing objections to the final compliance filing lapsed. In the course of this docket, the Commission had selected the Collocation Cost Model for establishing collocation costs.[2]

Given that the Commission had established collocation prices lower than the interim collocation prices, Onvoy requested a refund on November 13, 2000. Qwest presented its calculated refund to Onvoy in April, 2001. Further discussions prompted Qwest to revise its proposal three times throughout the year, but when the parties ultimately could not reach agreement about the amount of the refund due, Onvoy initiated the current complaint. Qwest counterclaimed, alleging that Onvoy still owed Qwest money under the contract.

II. PROCEDURAL ISSUES

A. Scope

Qwest argues that the Commission's NOTICE AND ORDER FOR HEARING unreasonably restricted the scope of this proceeding, precluding Qwest from presenting information relevant to its case. Specifically, Qwest argues that whenever a UNE's cost is at issue, it should be able to re-contest the Commission's choice of cost model. The Commission will reject this argument as untimely, impractical and unpersuasive.

First, the argument is untimely. Qwest initially raised this argument in its brief filed April 5, 2002, claiming that this "was the first time procedurally that Qwest was able to voice its objection in argument to the Commission's Order and Notice for Hearing." Qwest Exceptions at 5. But the Commission's rules of practice and procedure provided an earlier time for Qwest's objection. Minnesota Rules part 7829.3000, entitled "PETITION FOR REHEARING, AMENDMENT, VACATION, RECONSIDERATION, REARGUMENT" provides at subpart 1:

> Time for request. Any party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.

More than 20 days have elapsed between the time of the Commission's February 11 NOTICE

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[2] *Id.*, ORDER RESOLVING COST METHODOLOGY, REQUIRING COMPLIANCE FILING, AND INITIATING DEAVERAGING PROCEEDING (May 3, 1999). The model was sponsored by AT&T Communications of the Midwest, Inc. and MCI Comminations, Inc.

AND ORDER FOR HEARING and Qwest's April 5 brief, let alone its May 2 exceptions.

Alternatively, Qwest's objection could be understood as a request to reconsider the Commission's initial choice of cost models. On May 3, 1999, the Commission adopted "the findings, conclusions and recommendations of the Report of the Administrative Law Judge,"[3] including the recommendation to "[u]se the MCI/AT&T Collocation Cost Model to estimate collocation costs...."[4] A request to reconsider this Order would be still more untimely.

Moreover, Qwest's request is impractical. The last proceeding to adopt a cost model lasted from December 2, 1996 until June 22, 2000, or three and a half years; re-adjudication of this matter would certainly be time-consuming as well. The dynamics of a competitive market cannot support this kind of delay every time a complaint is filed. The Legislature acknowledged as much when it adopted the expedited complaint procedures under which the current complaint was filed. Minn. Stat. § 237.462, subd. 6.

Finally, Qwest's argument is ultimately unpersuasive. Qwest cannot realistically claim to have been deprived of the opportunity to be heard regarding the Commission's selection of cost models. As noted above, the docket for selecting the current cost models remained open for three and a half years. Throughout that proceeding, Qwest – in the form of its predecessor, US West – had ample opportunity to be heard.

Circumstances may indeed have changed since the model was selected, but that fact alone cannot trigger the selection of a new cost model. As the Commission noted in 2000:

> Costing models and inputs reflect the state of the art at a given point in time, but telecommunications technology and customer demand changes constantly. Assuming communications technology and customer demand continue to change, the models and inputs approved in this docket will gradually deviate from the state of the art. As a result, the price of some elements will exceed US West's future costs, and the price of other elements will be less than US West's future costs....

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[3] *Generic Cost Docket,* ORDER RESOLVING COST METHODOLOGY, REQUIRING COMPLIANCE FILING, AND INITIATING DEAVERAGING PROCEEDING (May 3, 1999) at 9, Ordering Paragraph 1.

[4] *Id.* at 3.

> In this docket, the Commission is establishing the terms of a contract that will expire in 2002. Parties will have the opportunity to advocate for these kinds of adjustments [to the cost models] at that time.[5]

As promised, the Commission has initiated a new docket for re-pricing Qwest's UNEs and interconnection.[6] Qwest's arguments would be more appropriately addressed there.

B. Late-Filed Reply to Exceptions

As noted above, the Commission received the ALJ Report on April 12, 2002. The Commission's rules of practice and procedure provide for parties to raise objections to the report within 20 days, and to reply to exceptions ten days later. Minn. Rules, part 7829.2700. While both Onvoy and Qwest filed exceptions in a timely manner, only Onvoy filed its reply within the 10-day limit; Qwest's reply arrived two days late. No party objected to the Commission accepting Qwest's reply.

Having reviewed the filing, the Commission can find no prejudice to any party arising from accepting Qwest's late-filed reply. It will be accepted.

C. Onvoy's Filing of May 29, 2002, and Qwest's Response

On the eve of the Commission's hearing, Onvoy filed a comment regarding alleged discrepancies between the positions argued by Qwest in the current docket and in a concurrent docket reconsidering the Commission-approved prices of Qwest's UNEs. Qwest informs the Commission that it has filed a response to Onvoy's filing.

The Commission finds these filings untimely. The Commission has simply not had sufficient time in which to analyze Onvoy's assertions and arguments, and has not even seen Qwest's response. Under the circumstances, the Commission will decline to give these filings further consideration.

III. SUBSTANTIVE ISSUES

The ALJ Report recommends that the Commission find as follows:

- Qwest may charge $300.46 per feed as the non-recurring cost (NRC) to deliver 40 amps of direct-current (DC) power to a cageless collocation site within Qwest's offices.
- Qwest may charge $1,383.61 per feed as the NRC for Qwest to deliver 200 amps of DC

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[5] *Generic Cost Docket,* ORDER GRANTING RECONSIDERATION, SETTING PRICES AND ORDERING COMPLIANCE FILING (March 15, 2000) at 6-7 (citations omitted).

[6] *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements UNE Prices*, Docket No. P-421/CI-01-1375.

power to a caged collocation site within Qwest's offices.

- Qwest may charge $1,300.53 as the NRC of an entrance facility cable, connecting an interconnection point outside of Qwest's central office to the equipment in a competitor's caged collocation site within the central office.

- Qwest may charge $2.03 per amp per month for providing alternating current (AC) power, but only on a prospective basis.

- Qwest may charge $14.72 per month, both prospectively and retroactively, for the preparation of collocation space that does not require a cage.

- Qwest may *not* charge a monthly fee for letting a 200-amp cable occupy space in a cable rack.

- The interconnection agreement's Direct Measure of Quality (DMOQ) terms – providing for Qwest to make payments to Onvoy if certain conditions are not fulfilled – apply to the provision of local interconnection service (LIS) trunks.

- Onvoy is entitled to $120,000 in DMOQ credits, plus waiver of the LIS NRC charges of $15,678.00.

- No party need pay penalties or attorney's fees for any other party.

- Qwest shall pay interest on certain amounts owed to Onvoy at 6% simple interest.

Having reviewed the full record of this proceeding and provided an opportunity for all parties to be heard, the Commission generally finds the reasoning of the ALJ Report persuasive. As a consequence, the Commission is led to reach the same findings and conclusions, and hereby accepts, adopts, and incorporates them into this Order[7] – with one exception. Regarding the ALJ's last recommendation, the Commission reaches a different conclusion. While the ALJ recommended disallowing interest payments from Onvoy to Qwest,[8] she recommended approving of such payments from Qwest to Onvoy. In the interest of equity, the Commission will not require interest payments from either party.

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[7]While the ALJ Report characterizes a LIS trunk as a UNE, a LIS trunk might otherwise be characterized as a combination of UNEs. This distinction does not alter the general soundness of the ALJ Report's recommendations.

[8]ALJ Report, Conclusions of Law ¶ 16.

IV. PROCEDURAL SCHEDULE

The ALJ Report proposes a procedural schedule to implement the recommended decisions. First, the ALJ recommends that Onvoy and Qwest, within 10 days of the Commission's order, file a final true-up or statement of charges with recalculated amounts:

1) For NRCs, using the rates approved for –
   - 200-amp, and 40-amp power,
   - fiber entrance cable, and
   - simple interest at 6%;

2) For the monthly recurring charge (MRC) arrearages, adding the MRC of $14.72 per cageless bay preparation to the calculated MRC of $20,040 from the agreed-upon dates; and

3) For the MRC on a prospective basis, adding the $14.72 per cageless bay MRC to the MRC of $22,517.68.

The ALJ recommended giving parties ten days in which to review the calculations and arrangements for paying their respective balances, and to file their remarks with the Commission. The Commission could then resolve any differences.

The Commission generally favors the ALJ's proposal as a reasonable and expeditious way to implement the decisions of this Order. However, the Commission will also direct parties to file comments within 30 days of this Order if there are unresolved differences regarding their respective payment obligations.

The further facilitate implementation, the Commission will specifically direct Qwest to make its DMOQ payments awarded herein, and to report on this fact within 30 days of the Order. The Commission will also direct the parties to file an amended interconnection agreement reflecting the decisions rendered in this proceeding.

Finally, given that the Commission declines to adopt the ALJ's recommendation to award interest payments, the Commission will decline to direct the parties to calculate such payment.

ORDER

1. Qwest's objection that its evidence was wrongfully ignored is denied.

2. Qwest's May 13, 2002 Reply to Exceptions is accepted.

3. Onvoy's filing of May 28, 2002 and Qwest's response are excluded from consideration.

4. Qwest shall charge $300.46 per feed as the non-recurring cost (NRC) to deliver 40 amps of

direct-current (DC) power to a cageless collocation site within Qwest's offices.

5. Qwest shall charge $1,383.61 per feed as the NRC for Qwest to deliver 200 amps of DC power to a caged collocation site within Qwest's offices.

6. Qwest shall charge $1,300.53 as the NRC of an entrance facility cable, connecting an interconnection point outside of Qwest's central office to the equipment in a competitor's caged collocation site within the central office.

7. Qwest shall charge $2.03 per amp per month for providing alternating current (AC) power, but only on a prospective basis.

8. Qwest shall charge $14.72 per month, both prospectively and retroactively, for the preparation of collocation space that does not require a cage.

9. Qwest may *not* charge a monthly fee for letting a 200-amp cable occupy space in a cable rack.

10. The interconnection agreement's Direct Measure of Quality (DMOQ) terms – providing for Qwest to make payments to Onvoy if certain conditions are not fulfilled – apply to the provision of local interconnection service (LIS) trunks.

11. Onvoy is entitled to $120,000 in DMOQ credits, plus waiver of the LIS NRC charges of $15,678.00.

12. No party need pay penalties or attorney's fees for any other party.

13. No party need make interest payments for amounts awarded in this Order.

14. Regarding further procedures,

    A. Onvoy and Qwest shall, within 10 days of the Commission Order, file a final true-up or statement of charges with recalculated amounts:

        1) For NRCs, using the rates approved for
            - 200-amp, and 40-amp power and
            - fiber entrance cable

        2) For the monthly recurring charge (MRC) arrearages, adding the MRC of $14.72 per cageless bay preparation to the calculated MRC of $20,040 from the agreed-upon dates.

        3) For the MRC on a prospective basis, adding the $14.72 per cageless bay MRC to the MRC of $22,517.68.

    B. Parties shall file their review of the calculations and arrangements of payments of respective balances within 10 days of the submission of true-ups.

C. Parties to file comments within 30 days of the Order if there are unresolved differences regarding their respective payment obligations.

D. Qwest shall make DMOQ payments to Onvoy and report to the Commission within 30 days of the Order.

E. Parties shall file an amended interconnection agreement reflecting the decisions rendered in this proceeding.

15. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc. Against Qwest Corporation Regarding the Pricing of Unbundled Dedicated Interoffice Transport

ISSUE DATE: November 5, 2002

DOCKET NO. P-421/C-02-550

ORDER RESOLVING COMPLAINT

PROCEDURAL HISTORY

On April 15, 2002, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint pursuant to Minnesota Statutes § 237.462 alleging that Qwest Corporation (Qwest) was over-charging for high-capacity connections between wire centers, called "unbundled dedicated interoffice transport" (UDIT).[1]

On April 30, 2002, Qwest filed an answer.

On June 3, 2002, the Commission issued its ORDER ESTABLISHING SCHEDULE FOR EXPEDITED CONSIDERATION OF COMPLAINT, finding jurisdiction and deciding that the matter could be resolved as a matter of law without evidentiary proceedings.

On June 10, 2002, Eschelon filed its brief.

On July 1, 2002, Qwest filed a reply.

On July 10, 2002, Eschelon filed a response.

On July 12, 2002, the Minnesota Department of Commerce (the Department) filed comments.

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[1] "*Interoffice transport*" provides a means for sending information – voice or data or both – between two central offices of a telephone company. "*Dedicated* interoffice transport" is used by one party, not shared as part of the switched public network. "*Unbundled* dedicated interoffice transport" is offered for sale by itself, without being combined with other network elements. Newton's Telecom Dictionary, 17th ed.

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On July 19, 2002, Qwest filed a response to the Department's comments.

The matter came before the Commission on August 29, 2002.

FINDINGS AND CONCLUSIONS

I. Background

The Telecommunications Act of 1996[2] (the Act) was designed to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The Act opens markets by requiring each incumbent local exchange carrier (ILEC) to –

- permit CLECs to purchase services at wholesale prices and resell them to customers;
- permit CLECs to interconnect with its network on competitive terms; and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to CLECs without requiring the CLEC to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[3]

A CLEC desiring to provide local exchange service can negotiate an interconnection agreement (ICA) with an ILEC to set the terms for interconnecting with the ILEC's network, buying services for resale, and buying the use of the ILEC's UNEs. 47 U.S.C. §§ 251(c), 252(a). A CLEC may insist on the same terms that an ILEC offers to another CLEC for any interconnection, service, or network element. § 252(i). In addition, the ILEC and the CLEC may adopt any terms that are not discriminatory or contrary to the public interest. § 252(e)(2)(A). If the ILEC and the CLEC cannot reach agreement, either party may ask the State commission to arbitrate unresolved issues and to order terms consistent with the Act. § 252(b).

On December 2, 1996, the Commission set interim rates for arbitrated terms in ICAs involving US West Communications, Inc. (US West), the predecessor to Qwest.[4] These rates would remain

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[2] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[3] 47 U.S.C. § 251(c).

[4] *Consolidated Arbitration Case*, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, and P-3167, 421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING.

in effect until permanent rates could be established in the *Generic Cost Case*.[5] The Commission ordered that parties could bill each other retroactively ("true up" their accounts) for the difference between the interim rates and the permanent rates for the elements and services they provided.

On October 4, 1999, the Commission approved an ICA, and first amendment to that agreement, negotiated between US West and Cady Telemanagement, Inc. (Cady), predecessor to Eschelon, largely based on another ICA adopted in Minnesota.[6] The agreement consists of a main contract document labeled "Part A," containing numbered paragraphs; several attachments; and two price schedules. Schedule 2, listing UNE prices then under arbitration, stated that "Rates are interim and subject to true-up based on further Commission proceedings." The agreement did not establish terms for providing UDIT. The agreement would last until the parties negotiated or arbitrated a new agreement, or until March 17, 2002, whichever occurred later. ICA Part A ¶ 1.2.

On January 24, 2000, US West and Cady completed negotiating a second amendment to their ICA establishing the price for collocation.[7] That amendment states in part as follows:

> 21.1. [F]inal decision of the MPUC [the Commission] in cost docket [*sic*] or other proceedings will govern the final determination of all cost issues, including the "true-up" of all costs already billed and collected.
>
> * * *
>
> Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both parties.

The proposed amendment was subsequently filed with the Commission and approved.

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[5] *In the Matter of a Generic Investigation of US West Communications, Inc. 's Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (*Generic Cost Case*).

[6] *In the Matter of a Request for Approval of the Interconnection Agreement and Amendment One to the Agreement Between US WEST Communications, Inc. and Cady Telemanagement, Inc.*, Docket No. P-5340, 421/M-99-1223.

[7] Second Amendment To Agreement For Local Wireline Network Interconnection And Service Resale Between Cady Telemanagement, Inc. And U S West Communications, Inc. Minnesota (UDIT amendment), *In the Matter of a Request by US WEST Communications, Inc. and Cady Telemanagement, Inc. for Approval of Amendment Two to the Companies' Interconnection Agreement*, Docket No. P-5340, 421/M-00-107.

On April 5, 2000, US West and Cady completed negotiating a third and fourth amendment to their ICA. One amendment established the terms for providing UDIT.[8] The UDIT amendment was drafted by US West, based on a US West cost study, and states in part as follows:

> 1. DESCRIPTION OF AMENDMENT AND MODIFICATIONS
> Added, as a new Section 37.14 to Section 37., "Unbundled Network Elements," of the Agreement, "Unbundled Dedicated Interoffice Transport," as follows....
>
> * * *
>
> 3. FURTHER AMENDMENTS
> ....Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both parties.

Unlike the second amendment, this filing did not specify whether the amendment's terms were permanent or interim subject to true-up. The proposed amendment was subsequently filed with the Commission and approved.

On June 22, 2000, the Department filed the list of permanent interconnection rates in the *Generic Cost Case*, including prices for high-capacity digital service (DS) lines such as DS1s and DS3s.[9] This filing concluded the case arbitrating permanent interconnection rates, and triggered the opportunity for parties to seek true-up payments from each other.

In March, 2001, Qwest began billing Eschelon (successor to Cady), for UDIT at rates higher than those established in the UDIT amendment. Also, beginning in October, 2001, Eschelon began asking Qwest for enhanced extended loops (EELs).[10] Qwest declined to provide EELs priced on the basis of the UDIT amendment, and instead charged Eschelon on the basis of the price of DS1 and DS3 lines.

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[8] Third Amendment To Agreement For Local Wireline Network Interconnection And Service Resale Between Cady Telemanagement, Inc. And U S West Communications, Inc. Minnesota (UDIT amendment), *In the Matter of a Request by US WEST Communications, Inc. and Cady Telemanagement, Inc. for Approval of the Third and Fourth Amendments to the Interconnection Agreement*, Docket No. P-5340, 421/M-00-433.

[9] A DS0 line is a standard telephone circuit, such as the line that connects to a standard telephone handset, and transmits 64,000 bits of information per second. A DS1 line transmits the equivalent of 24 circuits, or 1.544 megabits per second (mbps). A DS3 line can transmit the equivalent of 672 circuits, or 44.736 mbps. Newton's Telecom Dictionary, 17th ed.

[10] Eschelon describes an EEL as UDIT combined with a line connecting a customer's premises to Qwest's central office; it may also include multiplexing or concentration capabilities.

In October, 2001, Eschelon disputed these charges. Qwest responded in January, 2002, arguing that the permanent UNE prices for DS1 and DS3 supercede the UDIT prices established in the UDIT amendment. After further discussions failed to resolve the disagreement, Eschelon's complaint followed.

On April 4, 2002, in a separate docket, the Commission declared that –

> Effective on the date of this Order, all Qwest rates currently under review in the following dockets are declared interim and subject to true-up once final rates are established in these dockets: Docket No. P-421/CI-01-1375 (the UNE Pricing Docket) and Docket No. P-442, 421, 302/M-01-1916 (the AT&T Complaint Docket).[11]

II. Party Positions

A. Eschelon Complaint and Argument

Eschelon complains that Qwest –

- is charging an amount for UDIT, both by itself and as part of EELs, that is not consistent with the amount negotiated in its Commission-approved ICA, and
- withheld EELs service based on the UDIT amendment price, compelling Eschelon to sign a separate EELs amendment, based on a higher price, as a condition of service.

Eschelon asks the Commission to do the following, among other things:

- find that Qwest's actions constitute repeated and continuing violations of the ICA, Minn. Stat. §§ 237.06, 237.121(a)(2) and 237.121(a)(4) and the Act, including 47 U.S.C. 251(c)(3),
- order Qwest to bill Eschelon for UDIT, including the UDIT element of EELs, consistent with the terms of the UDIT amendment,
- order Qwest to immediately refund to Eschelon all overcharges for UDIT and EELs, and
- assess administrative penalties against Qwest.

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[11] *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements UNE Prices*, Docket No. P-421/CI-01-1375 ORDER ESTABLISHING INTERIM RATES. The *UNE Pricing Docket* was opened to establish the arbitrated terms for elements that were not addressed in the *Generic Cost Case*. The *AT&T Complaint Docket* was opened to establish new arbitrated prices for elements used in a common package known as the UNE Platform.

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APPENDIX I

B. Qwest's Response and Counter-Claim

Qwest argues that the Commission's orders setting interim prices for UNEs supercede the rate negotiated in the UDIT amendment. The ICA states explicitly that "Rates are interim and subject to true-up based on further Commission proceedings." Standard rules for contract construction support applying this language to the UDIT amendment. The Commission has twice declared UNE rates interim subject to true-up: once in its December 6, 1996 Order, and again in its April 4, 2002 Order.

If the Commission were to rule otherwise, then Qwest would provide UDIT to Eschelon at a lower price than it provides UDIT to any other CLEC, distorting the telecommunications market by placing those CLECs at a competitive disadvantage.

In sum, Qwest asks the Commission to dismiss Eschelon's complaint. Further, Qwest rejects the need for, and the propriety of, assessing administrative penalties. To the contrary, Qwest asks the Commission to direct Eschelon to pay the back charges withheld for the UDIT service Qwest has already provided, plus interest.

C. Eschelon Rebuttal

Eschelon denies that the ICA makes all rates interim subject to true-up. The ICA's only reference to interim rates appears at the beginning of Schedule 2, and by implication refers exclusively to the rates in that schedule. The UDIT amendment amends the ICA's main document, not Schedule 2, and therefore is not governed by that schedule's proviso. If the parties had intended to make the UDIT terms interim subject to true up, they would have done so explicitly as they did with their second ICA amendment.

Moreover, Eschelon argues that the *Generic Cost Case* did not establish a price for UDIT, so any effort to true-up the UDIT price to a price in that docket is pointless.

D. Department Position

The Department supports Eschelon's complaint. The UDIT amendment language and the circumstances of its adoption indicate that the parties did not intend the Amendment price to be interim subject to true-up. Additionally, the Department shares Eschelon's view that the *Generic Cost Case* did not establish a price for UDIT.

III. Commission Analysis and Action

As the conflicting positions of the parties suggests, the language of the UDIT amendment is subject to varied interpretation. As discussed at the hearing, that language -- including the price terms in dispute -- was drafted by Qwest. Standard principles of contract law provide that ambiguous terms will be construed against the drafter. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002).

Here Eschelon asserts that it understood the UDIT amendment to be a permanent price negotiated and approved pursuant to the Act's § 252. This assertion is reasonable and consistent with the record. While the ICA's Schedule 2 states that price terms are subject to true-up, Eschelon argues that the price terms of Schedule 2 are not at issue. The UDIT amendment is explicit about which parts of the ICA it amends; it does not amend Schedule 2 and so, according to Eschelon, Schedule 2's true-up proviso does not apply to the UDIT amendment. If the parties had intended to make the terms interim, Eschelon argues, they would have done so explicitly as they did in their second ICA amendment. Again, these assertions are reasonable and consistent with the record.

While Qwest asserts that the UDIT amendment will provide Eschelon with a competitive advantage over other CLECs, this allegation remains unproven. The Act's § 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Potentially other CLECs will seek to adopt the UDIT amendment as well.

Further, since the expiration date for the Eschelon/Qwest ICA has passed, the agreement remains in effect only by the consent of the parties. At any time Qwest may seek to renegotiate with Eschelon or, failing that, ask the Commission to arbitrate new terms. ICA Part A ¶ 1.2. Until this occurs, however, the relationship between Qwest and Eschelon will continue to be governed by that agreement, including the UDIT amendment.

Eschelon brought its complaint pursuant to Minnesota Statutes § 237.462, which provides for administrative penalties. Before assessing penalties, the Commission must consider a number of factors, including "the willfulness or intent of the violation." § 237.462, subp. 2(b)(1). Given the degree of ambiguity in the language, the Commission cannot conclude that Qwest's interpretation was made in bad faith. Consequently, the Commission will decline to impose penalties in this matter.

In sum, the Commission finds that Qwest must provide UDIT to Eschelon on the basis of the terms contained in the UDIT amendment, and that neither of the Commission's orders declaring UNE rates to be interim subject to true-up are applicable here.

The Commission will so order.

ORDER

1. The Commission finds that the terms of the UDIT amendment to the Eschelon/Qwest ICA are not interim subject to true-up.

2. No administrative penalties are warranted in this matter.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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APPENDIX J

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of Desktop Media, Inc. Against Qwest Corporation Regarding Interconnection Terms

ISSUE DATE: October 28, 2002

DOCKET NO. P-421/C-02-1597

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On December 15, 2000, the Commission approved the interconnection agreement (ICA) between Desktop Media, Inc. (Desktop) and Qwest Corporation (Qwest) in Docket No. P-5934, 421/IC-00-1509. Desktop adopted the AT&T - U S WEST interconnection agreement.

On September 24, 2002, Desktop filed a complaint against Qwest pursuant to Minn. Stat. § 237.462. The complaint alleged that Qwest has violated the terms of its ICA with Desktop, thus hindering Desktop's ability to compete in the market. Desktop requested an expedited proceeding to resolve its complaint.

On October 10, 2002, Qwest filed an answer denying that the Commission has jurisdiction over Counts 2 and 3 of Desktop's complaint, objecting to an expedited hearing of this matter, and requesting that the complaint be dismissed.

The Commission met on October 16, 2002 to consider this matter and issued its ORDER ASSERTING JURISDICTION, FINDING REASONABLE GROUNDS TO INVESTIGATE, AND DECIDING TO REFER THE MATTER TO OFFICE OF ADMINISTRATIVE HEARINGS in this matter on October 28, 2002.

FINDINGS AND CONCLUSIONS

I. JURISDICTION AND REFERRAL FOR CONTESTED CASE PROCEEDINGS

The Commission has jurisdiction over all counts of Desktop's complaint. In addition to the grounds provided by Desktop in its complaint[1], the Commission notes that clause (3) of Minn. Stat. § 237.462, subd. 1 refers to violations of "an approved interconnection agreement if the violation is material," such violations being the crux of Desktop's allegations.

[1] Desktop cited 47 U.S.C. §§ 252(e) (authority of state commissions to enforce ICAs), 251(c)(2) (duty of incumbent carriers to interconnect with CLECs); Minn. Stat. §§ 237.081 (Commission investigations), 237.462 (competitive enforcement); and Part A, Section 11.1 of the ICA (continuing jurisdiction of the Commission to implement and enforce all terms and conditions of the ICA).

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The Commission finds that it cannot satisfactorily resolve all questions regarding the issues raised by Desktop and Qwest in this matter on the basis of the parties' filings and oral arguments. For administrative efficiency, the Commission believes that referring the matter to the Office of Administrative Hearings for a contested case hearing is preferable to an expedited hearing under Minn. Stat. § 237.61. The Commission, therefore, will refer the matter to the Office of Administrative Hearings for contested case proceedings pursuant to Minn. Stat. § 237.081, subd. 2 (c).

II. ISSUES TO BE ADDRESSED

Parties shall address the following issues in the course of the contested case proceedings ordered herein:

(1) The issues raised by Desktop's complaint.

(2) The issues raised by Qwest's answer, including the jurisdiction questions.

The parties may also raise and address other issues relevant to this matter. The ALJ is requested to make findings and recommendations regarding these issues, including the jurisdiction questions.

III. PROCEDURAL OUTLINE

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Richard C. Luis. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2542.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Kevin O'Grady, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 282-2151; or Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-1852.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are the Companies and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Monday, November 4, 2002 at 1:30 p.m. in the Large Hearing Room, Public Utilities Commission, 121-7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

The Commission takes allegations that Qwest has improperly and intentionally inhibited Desktop in its ability to compete effectively in the local telecommunications market seriously. Promotion of effective competition at the local service level is a policy priority established by the Minnesota legislature and embraced by the Commission. Expeditious resolution of complaints such as Desktop's is an important way to advances that policy priority. The Commission respectfully asks the Office of Administrative Hearings to conduct the contested case proceedings in light of these expressions.

IV. APPLICATION OF ETHICS IN GOVERNMENT ACT

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to general rate cases. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

V. *EX PARTE* COMMUNICATIONS

Restrictions on ***ex parte*** communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this case to the Office of Administrative Hearings for contested case proceedings, as set forth above.

2. A prehearing conference shall be held on Monday, November 4, 2002 at 1:30 p.m. in the Large Hearing Room, Public Utilities Commission, 121-7th Place East, Suite 350, St. Paul, Minnesota 55101.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Complaint of Desktop Media, Inc. Against Qwest Corporation Regarding Interconnection Terms	MPUC Docket No. P-421/C-02-1597 OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Richard C. Luis, Office of Administrative Hearings, Suite, 1700, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 349-2542

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY:_____

DATE: _____

APPENDIX K

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of McLeodUSA Telecom Development, Inc. Against Qwest Corporation Regarding the Payment of Switched Access Charges

ISSUE DATE: October 14, 2002

DOCKET NO. P-421/C-02-1439

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On August 28, 2002, McLeodUSA Telecom Development, Inc. (McLeod) filed a complaint against Qwest Corporation (Qwest). The complaint alleges that Qwest has violated the terms of (i) its interconnection agreement (ICA) with McLeod, (ii) McLeod's tariffs, and (iii) other contractual arrangements with McLeod by improperly routing and recording traffic resulting in a failure to pay intrastate switched access charges to McLeod in the amount of $90,514.41 (for the period from November 1, 2001 through July 31, 2002). In its complaint McLeod requested an expedited hearing and sought temporary relief pursuant to Minn. Stat. § 237.462, Subd. 7.

On September 12, 2002, Qwest filed its answer requesting that the Commission deny McLeod's request for temporary relief and, after an expedited proceeding that it did not oppose, dismiss McLeod's complaint its entirety, with prejudice.

The Commission met on September 17, 2002 to consider this matter.

On October 13, 2002, the Commission issued its ORDER ASSERTING JURISDICTION, DENYING REQUEST FOR TEMPORARY RELIEF, AND REFERRING MATTER TO OFFICE OF ADMINISTRATIVE HEARINGS.

FINDINGS AND CONCLUSIONS

I. JURISDICTION AND REFERRAL FOR CONTESTED CASE PROCEEDINGS

The Commission has jurisdiction over McLeod's formal complaint under Minn. Stat § 237.081, subd. 1(a) and 237.462, subd. 7 because the complaint raises local service issues involving intrastate tariffs and interconnection agreements. If the Commission finds that a significant factual issue raised has not been resolved to its satisfaction, the Commission shall order that a contested

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case hearing be conducted under Chapter 14 unless the complainant, the telephone company (respondent) and the Commission agree that an expedited hearing under Minn. Stat. § 237.61 is appropriate.

The Commission finds that it cannot satisfactorily resolve all questions regarding the issues raised by McLeod and Qwest in this matter on the basis of the parties' filings and oral arguments. For administrative efficiency, the Commission believes that referring the matter to the Office of Administrative Hearings for a contested case hearing is preferable to an expedited hearing under Minn. Stat. § 237.61. The Commission, therefore, will refer the matter to the Office of Administrative Hearings for contested case proceedings pursuant to Minn. Stat. § 237.081, subd. 2 (c).

II. ISSUES TO BE ADDRESSED

Parties shall address the following issues in the course of the contested case proceedings ordered herein:

(1) The issues raised by McLeod's complaint.

(2) The issues raised by Qwest's answer.

(3) The standards for penalties under Minn. Stat. § 237.462 and whether any violation found was "knowing and intentional".

In addition to making findings and recommendations regarding these three categories of issues, the ALJ is also asked to give input, not on a recommended dollar amount of any penalty, but on the credibility of witnesses and the issue of whether any violation found was "knowing and intentional"

III. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Allan W. Klein. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7609.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Kevin O'Grady, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 282-2151; or Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-1852.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are the Companies and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Thursday, October 24, 2002 at 1:30 p.m. in the Small Hearing Room, Public Utilities Commission, 121-7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

McLeod requested temporary relief in this matter. While the Commission did not find grounds as specified in Minn. Stat § 237.462, subd. 7 to grant the temporary relief requested[1], both McLeod and Qwest have expressed an interest in an expeditious resolution of this matter and the Commission concurs that this would be beneficial.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these expressions.

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[1] See the Commission's ORDER ASSERTING JURISDICTION, DENYING REQUEST FOR TEMPORARY RELIEF, AND REFERRING MATTER TO OFFICE OF ADMINISTRATIVE HEARINGS issued in this docket on October 14, 2002.

IV. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to general rate cases. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

V. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this case to the Office of Administrative Hearings for contested case proceedings, as set forth above.

2. A prehearing conference shall be held on Thursday, October 24, 2002 at 1:30 p.m. in the Small Hearing Room, Public Utilities Commission, 121-7th Place East, Suite 350, St. Paul, Minnesota 55101.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Complaint of McLeodUSA Telecom Development, Inc. Against Qwest Corporation Regarding the Payment of Switched Access Charges	MPUC Docket No. OAH Docket No. P-421/C-02-1439 **NOTICE OF APPEARANCE**

Name, Address and Telephone Number of Administrative Law Judge:

Allan W. Klein, Office of Administrative Hearings, Suite, 1700, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 341-7609

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY:_____

DATE: _____

APPENDIX L

go to Mr. Bradley and Ms. Clauson right after lunch. So why don't we take a break until 1:00.

(Whereupon, a recess was held from 11:50 a.m. to 1:02 p.m.)

CHAIR KOPPENDRAYER: Is everybody ready? Well, we'll reconvene and continue our discussion.

Ms. Clauson.

MS. CLAUSON: Chair Koppendrayer, Commissioners, Karen Clauson from Eschelon. We've had some discussion this morning about what the task is here today; and, just briefly, I think the task is very simply whether to adopt the ALJ's recommendations and, in the areas where the ALJ found noncompliance, how -- what steps should be required to bring Qwest into compliance so that you can then vote for approval.

So I'd like to, you know, walk through the ALJ rulings and some of the things that have been discussed that I guess give Eschelon's perspective on what this actually says and what it means. Which there's been a lot of issues that I think bring us pretty far away from the ALJ's ruling. I'd like to get back to it because the ALJ ruling does provide a good road map for how to address the shortcomings so that Qwest can in pretty

short order bring itself into compliance with the order.

I am -- I believe you said there was separate discussion of public interest. I'm not addressing that; but I'm addressing the other issues in the ALJ ruling with respect to billing accuracy, the DUF accuracy, conversion, et cetera. And with respect to those issues, the state has a role and is playing an important part in making changes that are benefiting consumers and competition. You know, Minnesota and Arizona are still looking at these issues, and it really is having an impact.

Eschelon has been raising problems, for example, with the -- as outlined in the affidavit of Lynn Powers, which is Exhibit WCD-23, the problems Eschelon has been raising for a long time with the conversion and outages at the customers -- at the time of the customer conversion, installation quality. You know, before Arizona, Minnesota really took an interest in this, before the ALJ's ruling came out, before Arizona did a data reconciliation to look at our data, you know, even though Qwest was providing evidence of this problem on a monthly basis -- even though Eschelon was providing evidence of this problem on a monthly basis to Qwest, nothing

happened; it was only denials. Now we are getting some relief; and it's in the form of changing OP-5, the measure for installation quality, that we always said was not capturing the end-user customer's experience to adjust it to capture it. And PO-20, when revised, as Arizona has recommended, they will start to do it.

Without these two continuing proceedings, never mind what's happening in those nine state proceedings, if we had gone with what had happened in those nine state proceedings, that progress wouldn't have occurred. And that progress does not just assist Eschelon with its particular issue it's been raising; it affects all CLECs who are trying to get customers, convert customers over.

And in the end the whole thing that's being measured, all those changes that are being made are to better reflect the end-user customers' experience, and that's your main concern. That would not be happening if Minnesota and Arizona had folded up their doors and said, Well, these other states are done; we're done too. It's happening because of the attention you're giving these issues, and we'd ask you to continue to do that till the job is done.

Let me go through each -- going to the ALJ's ruling and what they found, in particular paragraphs 5 and 6 on page 104. There's, I think, some loose description or some idea out there that this is all about UNE-Star and, gee, UNE-Star is an oddball thing; should we really care about that. And I believe that a close reading of the ALJ's order just doesn't support that. Yes, there's some discussion of UNE-Star, and there's some talk of what should be said; but it -- there are findings with respect to billing accuracy and DUF accuracy generally, and they affect UNE-P; they affect On-Net loops. This is not all about UNE-Star. UNE-Star may have got some of the discussion to where it is.

So if we go to page 5 -- sorry, paragraph 5 on page 104, this is an area where the ALJ found noncompliance -- they found non-access in network elements. And it says the required showing cannot be made until Qwest has completed a couple of different things. One of them is a conversion of UNE-Star facilities to UNE-P. The other one is that Qwest must demonstrate that its billing system is capable of meeting the appropriate performance measure for wholesale billing and providing accurate DUF records to allow CLECs to appropriately charge

for switched access.

So I'm going to get back to UNE-Star at the end, but that's really a small part of what we're talking about. We're talking about overall for any product billing accuracy and DUF accuracy.

If you go to paragraph 100 on page 35, again the finding is that Qwest's application for 271 approval should not be approved until Qwest has demonstrated not just that all UNE-Star lines have been converted to UNE-P, but also that Qwest's performance in billing for these lines meets the established standard for UNE-P. And it goes on and we have -- and talks about the conversion to UNE-P. But if you go to page 93, that's, I think, where the relationship between the two really becomes clear and shows we're talking generally about billing accuracy and DUF accuracy.

All that discussion of UNE-Star that precedes this in paragraph 312 is where the ALJ says the factual record of this docket establishes a serious adverse impact of UNE-Star reporting on the reliability of the data used to demonstrate compliance with the performance standards for billing. And before this with performance standards, it talks about commercial performance.

So what you've got -- And if you look at paragraph 313, the conclusion is Qwest has failed to show that the billing is accurate that would allow CLECs to meaningfully compete using UNE-P in Minnesota. It doesn't say UNE-Star. It says UNE-P. And why is that? That's because the ALJ found that the only evidence that Qwest put in, primarily ROC evidence, was not reliable. So this is an evidentiary matter.

If you go to paragraph 3 on page 104, it tells you what you already know; that the burden of proof is on Qwest. Eschelon didn't have to come here and bring you some outside audit that they would just attack as not being done under procedures they agreed with anyway. Qwest had the burden, and it didn't meet it. And I'll go through the reasons it didn't meet it, and only one of those reasons is UNE-Star. It gives others.

As an evidentiary matter you have before you by the only one in Minnesota who looked at this issue, the ALJ, a finding that Qwest didn't meet its burden. So Qwest can talk about the ROC OS test all it wants. The ALJ said that's out; we need something more. And I'll go through what the something more is. They didn't meet their burden.

I don't have to come in here and meet it for them. They had a chance. They were here. They did bring their evidence in, and they didn't meet it.

So billing accuracy generally, what did -- and I am talking about UNE-P, On-Net, any billing accuracy generally, what did they find? He found, if you go to paragraph 320 on page 96, in paragraph 320 the ALJ did refer to the problems manipulation of UNE-Star billing. That's one of the things that the ALJ looked at. Then the second sentence of paragraph 320 starts with in addition. In addition. So there is other problems. There's other billing problems that need to be addressed, and you're told here what can be done about them.

One of them is that the PID measures only total dollar adjustments. No measurement is provided regarding what percentage of CLEC billing is in error. Failing to account for the amount in dispute affords the opportunity for manipulation of the error rate. The PID does not account for these adjustments in the month when the CLEC was billed. Thus, many months of errors can be hidden by making one adjustment in a single month. Similarly, the PID can be manipulated by Qwest's choice of which CLEC bill to adjust in any particular month.

So on paper it looks, for example, like in the PAP you've got a system where if there's a repeat billing problem, CLECs will be compensated for that to some degree because the bill -- they occurred for several months. But that's not what's happening. What's happening is Qwest can choose to store those adjustments up, pay them in one month, take one miss, even though a CLEC has had to sweat through 12 months of inaccurate bills. That's a problem with the measure that you can fix. You can require them to fix it as a requirement of getting 271.

Then it goes on --

CHAIR KOPPENDRAYER: That's not under UNE-P. That was under UNE-Star.

MS. CLAUSON: No, that's any measure. That's -- That's a comment on the PID. The PID doesn't claim to measure UNE-Star. It doesn't even recognize what it is. It lists several products. Qwest has said doesn't matter whether you request by UNE-Stars, UNE-P, or not. Any -- Any product that's measured under the PID works this way. It does not -- This finding is not restricted to UNE-Star.

Then if you go to the next paragraph, paragraph 321, again you're talking about overall

performance measurement. This is not an issue listed to -- restricted to UNE-Star. In the last four months before -- you know, the last four months available to the ALJ, they found that Qwest had failed BI-3A in three of the last four months. And they look at that in conjunction with this as going to their performance. And so if you want to look now, here's again something you'd do: Get the last four months before you now; have them submit it. But when you do it, keep in mind the learning that you've gotten from the ALJ. Get the CLEC specific for those CLECs that will agree to give you their confidential information as well as the -- as well as the information for the CLEC aggregate, compare it and see, A, if the CLECs for which you've got the measure are -- for example, do they have DUF; what are their things; and then go back to the paragraph I read you before on the problems with the adjustments and what can be hidden and see, for example, are there CLECs where the measure -- the -- for example, in December are there CLECs where their performance is, say, 75 percent or below. Then the aggregate is 100 percent or better. If that's the case, you know, we need to figure out why that is, because I think there's an impression out there that

if Qwest is reporting 100 percent CLEC aggregate results that the CLECs have 100 percent performance, and that's not the case.

So, again, it's something that by both fixing that measure, doing what the ALJ said, and looking at the most recent results, including CLEC-specific results, together those two things can get -- help get to the bottom of this billing accuracy problem.

CHAIR KOPPENDRAYER: Excuse me. I somehow just lost my voice. But I'm trying to think through what you're suggesting here. I'm going to do all that when?

MS. CLAUSON: Before 271 approval is granted. And that will give an incentive --

CHAIR KOPPENDRAYER: Before --

MS. CLAUSON: -- to do it quickly.

CHAIR KOPPENDRAYER: Before 4:00 or before tomorrow afternoon?

MS. CLAUSON: Well, I'm sure not here assuming that approval will be granted on this record, will be recommended. I think that --

CHAIR KOPPENDRAYER: But we're going to make a recommendation.

MS. CLAUSON: You could certainly make a

recommendation --

CHAIR KOPPENDRAYER: So I don't -- what do I -- What are you suggesting I do with all this before I make a recommendation?

MS. CLAUSON: I -- I think you make a ruling that at this time Qwest does not comply but Qwest can bring itself into compliance by taking certain steps. I'm just talking about the steps on these issues. One of those is to revise the billing accuracy measure. Another is to do what the ALJ said.

CHAIR KOPPENDRAYER: But, Ms. Clauson, wouldn't we be better off to take the department's advice -- whether we -- Whether we recommend or not, I'm not suggesting we take their advice on that one; we've got to make up our own mind -- but that we make up our own mind now based on the evidence what our recommendation would be, but then take these up -- issues up later on a different docket in a different venue?

MS. CLAUSON: Chair Koppendrayer, Commissioners, no, I certainly don't believe so. These --

CHAIR KOPPENDRAYER: We should resolve all of what you're putting before us before we make

a recommendation to the FCC?

MS. CLAUSON: I think the recommendation can be to deny until certain conditions are met. But the reason --

CHAIR KOPPENDRAYER: But the FCC isn't going to wait for us to get those conditions met. They're going to give'er a thumbs up or thumbs down before we ever get there. That's what I -- That's my assumption. So help me with my dilemma here.

MS. CLAUSON: We certainly all fear that result.

CHAIR KOPPENDRAYER: Okay.

MS. CLAUSON: I know that Eschelon would prefer Minnesota go in with a denial and get overruled than to give a recommendation that can't be supported on this record. You know, you asked me the question: Couldn't we do this in individual complaints? We're talking about billing accuracy and the DUF file, which affect all CLECs; and we're also talking about a record that's already been developed that a party like Eschelon, a small start-up company that's facing a dried-up capital market, can't reinvent the wheel on that. You're almost there. Finish the job and tell the FCC you'd like them to respect your record and let you finish

the job; that you don't think that -- with the right incentives it won't take that long. If they overrule you, you know, I'll be disappointed in that ruling too. But it's, you know, one more bad decision. But, you know -- you know, we are dealing with this record, and do your job on this record. Don't send us off to complaints which no way can address all of these billing accuracy, DUF record issues the way you can. And we are getting results. I mean, Arizona staff has just recommended a retest of the DUF. It's recommended certain things on the UNE-E. And you can make those recommendations. You know, with the incentive of 271 still out there, there's just a far greater probability we'll get something done on them than if we don't have that.

CHAIR KOPPENDRAYER: So we should say we're making very good progress; give us a little more time?

MS. CLAUSON: And I explained, based on your record, as AT&T was going through, you have a different record. And you have your own record, you have your own recommendations, you have a different timing. You know, some of these issues, for the reasons AT&T went into, weren't addressed in the same way or as fully as you have. And, you know,

you defend your record. You say, We can't control what they do about it, but try to make these changes that will make a difference.

COMMISSIONER SCOTT: Would you give us the steps again? Revise the billing accuracy measure, get the last four months of data.

MS. CLAUSON: I was just starting my list. I have some more, if I could go through them, and then I could recap.

MR. GARVEY: That's actually for me.

MS. CLAUSON: Oh, I thought it was for me.

MR. GARVEY: I thought it was for you too.

MS. CLAUSON: Oh --

MR. GARVEY: Sorry.

MS. CLAUSON: -- well.

MR. GARVEY: Sorry. Sorry, Mr. Chairman.

MS. CLAUSON: Okay. I'm not going to share those thoughts with you. They're not -- not from my notes. So if you wouldn't mind --

CHAIR KOPPENDRAYER: Who's making the list here?

MS. CLAUSON: Yeah, when you asked for that, the list started to grow apparently. So other

people can chime in on the list. But so if you look through the ALJ's ruling, you've got the billing accuracy; you've got looking at the most recent months, having them resubmit it CLEC-specific; and looking at what products do the CLEC order. And let me go into that more by going through the DUF accuracy.

And let's just eliminate a misconception right away. In the ALJ's order at paragraph -- And that misconception is that there's some old information that doesn't refer to mechanized in here or doesn't apply somehow. And let's go through what's really in the record in this case from the only witness who has firsthand knowledge about UNE-E and mechanization, Lynn Powers.

If you go to paragraph 317 of the order -- I mean of the ALJ ruling, in there it says in the first line, Qwest indicated that the manual process was replaced by mechanized DUF transmission on UNE-Star lines by approximately March of 2001 -- note that the date on the Powers' affidavit is June 7th, 2002 -- and adopted at that point a DUF process exactly the same as the process used for UNE-P.

So when you go to paragraph 7 -- page 7,

paragraph 16 of the Powers' affidavit, you've got a paragraph on switched access and that the -- that started out talking about UNE-E and UNE-Star. But as you read through it, it talks about the more recent experience and a very recent increase in the minutes; wasn't sure what that meant; didn't bring us up to where we were supposed to be. Came closer; didn't do that. Also, there's footnote 13: This is true for On-Net customers as well. So it doesn't matter whether the product is UNE-Star, UNE-P, or loop, you've got missing minutes for switched access. That's what this means, that's what's in front of you, and that is consistent with what the ALJ is saying. So you -- all three it's the same process. And paragraph 317 says the DUF process is exactly the same process for UNE-P now.

So looking at the mechanized process that's in place, you know, certainly Eschelon is claiming that today minutes are missing. What does it mean when minutes are missing? That means that revenue that a cash-starved company like Eschelon could have by billing IXCs for calls it carried, expenses it incurred, it can't do. It's losing that money every month. Now, where is that money going? There's -- If Qwest hasn't given us the records,

maybe nobody's being billed; maybe the money's going to Qwest. We don't know that. But what we do know is we're not getting it. We're being starved. And this is every CLEC. It's not Eschelon; it's every CLEC isn't getting that money. And the evidence to the contrary that's supposed to be evidence to the contrary that it is -- we are getting it, that it is complete, was found in paragraph 318 and paragraph 312 to be not reliable.

In paragraph 318 once again the ALJ gives you a road map to what to do. It says there's been no retesting. There's no test information that's available to you. So what's the obvious way to address that? To have a retest. AT&T has already pointed out it wouldn't take that long. AT&T has already pointed out that not only did the staff, after looking at our data in Arizona, recommend a retest within 12 months, it -- it -- well, I forgot what I was going to say. The staff not only did it recommend it -- I remember -- Qwest agreed to it. So Qwest agreed to it in Arizona; won't here in Minnesota. We don't know why that is. But we need a retest. And if you're going to have any involvement and if it's going to satisfy you that paragraph 318, paragraph 317, the paragraphs in this

order relating to DUF accuracy have been satisfied, you know, you need to involve yourself in that retest to get the results and get some information for Minnesota as well. So a retest is one of the things that's just a natural thing to order coming from this ALJ ruling.

The ALJ also points out another thing that you have the ability to cure, and that's in footnote 49 of page 97. The ALJ says -- And, again, this is with respect to all products. With respect to all products there is no billing PID to reflect completeness of daily usage file records. No PID. So this is not being measured. Hence, the problems that CLECs encounter with daily usage file data discussed above would never have been detected from PID results. And so we could have a PID for measuring the completeness of daily usage records.

You know, this is what's happened in Arizona. In Arizona through the data reconciliation it was found that OP-5 was not actually capturing what it should, and Qwest has not gotten 271 until it's agreed to make those changes. Same thing could happen here. Until this is corrected and there is some measure of the completeness of the daily usage files, they -- you can wait to give your approval.

So, again, when you get the most recent data on billing, you need to know whether the CLEC-specific information you're looking at is from a CLEC that gets the DUF records. For example, McLeod has filed with you an amendment, Qwest and McLeod a proposed amendment -- I'm not sure whether they've approved it yet or not -- for some UNE-M rates. And in there they say they are yet to convert those lines. So those lines, according to that amendment, are still on UNE-Star, meaning they're not getting DUF access. So is their -- if you're looking at their CLEC data, is it as meaningful as ours, which we are getting the DUF and right currently it's inaccurate. So that is an issue to look at. And that's with respect to all products, the DUF.

Then the ALJ certainly did address -- Qwest originally called it UNE-E, UNE-Eschelon. Now it's being called UNE-Star, although that term has more than one meaning. And with respect to that particular issue -- and now I am talking about UNE-Star, not all products -- you know, Qwest, through a witness that claims to have no firsthand knowledge of the conversations and can't because it's never had any communica -- because that person

has never had any communications with Eschelon, claims that Eschelon asked them not to move, not to convert their base. That's not the record in front of you.

If you look at Exhibit 5 to the Powers' affidavit, attached to that there's an e-mail. A lot -- In addition to Lynn Powers, a lot of people from Qwest are copied on that e-mail. And it says, Please let me know if I have inadvertently misstated anything. You'll notice Qwest didn't put in any -- any e-mail saying they had inadvertently misstated anything. This is a contem -- in this document in talking about what is the issue. And if you look at paragraph 2 on page 3 of that exhibit, it refers to Jeff Thompson. Jeff Thompson until very recently has been the main IT person dealing with all these issues at Qwest. And it says that Jeff said that Eschelon should wait to implement UNE-E until Qwest changes its back end legacy systems to bill for UNE-Star, so don't move your base until you are getting accurate bills for UNE-Star. Does Eschelon get accurate bills for UNE-Star?

COMMISSIONER SCOTT: What's the date of that statement?

MS. CLAUSON: May 23rd, 2001.

COMMISSIONER SCOTT: Okay.

MS. CLAUSON: Does -- So the specific direction from Qwest's IT group: Don't move -- Don't start ordering UNE-Star until we convert your base. So what are the conditions they're going to convert the base? Now, when I say convert the base, I'm not talking about converting to UNE-P; I'm talking about converting a base of customers, resale customers that are being billed as resale; you know, they get a bill that says, Here's the retail rates with the wholesale discount, converting that to accurate UNE-E bills.

COMMISSIONER SCOTT: Because one of the secret deals says Eschelon for some reason was entitled to UNE-P conversion, but Qwest wasn't able to do it, and this is the interim move?

MS. CLAUSON: No, this is earlier than that. This is -- The original -- You know, Eschelon was ordering resale --

COMMISSIONER SCOTT: Yeah.

MS. CLAUSON: -- and for UNE line still orders resale today and gets a bill that shows the discount. And what that original bill said -- I mean, the contract requires us to accurate billing. There's nothing in that UNE-E bill that says, oh, by

the way, you won't get accurate billing. And this is the plan for how to --

COMMISSIONER SCOTT: I see.

MS. CLAUSON: Because there's rates in the contract for what UNE -- It doesn't say you'll get a wholesale discount. The contract that you approved, the amendment for UNE-E rates says these are the rates Eschelon will pay. But we don't get a bill with those rates in it; we -- the ones you approved; we get a resale bill, and then there's all this math going on to find out what the amount should be. It's very inexact.

So here's in evidence about what was supposed to happen. Not only are we not supposed to move until they've changed our back end system, which still hasn't happened; but then there's a discussion, if you read on, about under what conditions will that happen. And the conditions under where that will happen are of great interest to you, because the main condition is that Qwest will develop -- they called it a tool, like a software tool, to do it without adverse customer impact. And there's talk here, and now we're talking end-user customers. In other words, they're making a billing change. The customer doesn't care.

They've ordered a product. They haven't ordered UNE-Star or UNE-P. They've ordered a product. They're getting a rate from us, and they shouldn't have a disruption in their service because now the billing from Qwest to Eschelon is going to change. And that's also in paragraph 6 of the Powers' affidavit. This is going to be done without customer impact.

So Eschelon has never said to Qwest, Don't move our base. What we've said is, Don't hurt the end users when you do it. And there have been some, you know, proposals for how to do it. There's never been one that's not highly manual that won't -- won't -- adverse -- You know, this is the position today: You've got to live up to your agreement to move them, but you've got to do it in a way that doesn't affect the end-user customers.

So that is where -- you know, that is where the evidence in this record shows that issue's at. That's the situation today. And so in Arizona, which just looked at this issue too, what the staff recommended is until Qwest does this, until they accurately bill for that, count the inaccuracies in the billing measure. And right now Qwest is not counting those inaccuracies in the billing measure.

They're claiming we agreed to it. That's not what this says. We haven't agreed to that. And not only should you count as inaccuracy in the billing measure, the staff recommended they be given 90 days to fix the problem, to do what they said back in May of 2001 they were working on.

So those are -- You know, that, again, is the smaller issue. The bigger issues are the accurate billing, the DUF records. But with respect to UNE-E and UNE-Star, you should count those inaccuracies in the billing measure because, until they're counted, what would be the incentive for fixing it? And that's the issue there.

So, again, billing accuracy and DUF, they affect all CLECs. This is not suited for individual complaints. You've done a lot of the work. Do this last piece. This is a piece you're not going to be doing in the unfiled agreements. You know, here you can say, You don't comply; here's a road map to complying for 271. In the unfiled agreements you're dealing with something else. You're not really ordering, you know, changes in PIDs in that case. This is the case to do that in.

So, you know, our request is you require Qwest to comply in the areas where the noncompliance

was found. I've, you know, basically limited my comments to these areas where Eschelon was named. We certainly agree with some of the issues brought up, the OSS issues by WorldCom, some of the issues by Covad; but, you know, they can speak to those issues.

Thank you. Do you have questions?

CHAIR KOPPENDRAYER: Thank you.

Questions of Ms. Clauson?

Thank you.

Does Covad want to go next?

MR. PLISKIN: Let Mr. Bradley.

CHAIR KOPPENDRAYER: Mr. Bradley.

MR. BRADLEY: Certainly. Chair Koppendrayer, Commissioners, Mike Bradley representing a CLEC coalition.

Ms. Wells, I have some handouts for the OSS and the non-OSS. What they are is the actual action items I'm requesting the commission to take with respect to those two dockets.

COMMISSIONER SCOTT: Are you going to address conclusion of laws numbered 4 and 6 at all? It's collocation forecasting, and then 6 has a litany of items.

MR. BRADLEY: No.

APPENDIX M

report and recommendation, and the second following further briefing on the penalty procedure -- excuse me, on the amount of the penalty, if any, that should be imposed.

And I would like to request, if I could, a reading from the commission since it will affect the scope of my comments.

CHAIR SCOTT: Fair enough. Let's -- I guess maybe we should take the -- whether to adopt the ALJ report first and then deal with the issue of remedies, do you think, my fellow commissioners? Are you okay with that? All right. Let's do that. So let's first just focus on the adoption of the ALJ report.

MR. SPIVACK: Thank you, Chair Scott. Chair Scott, Commissioners, on behalf of Qwest we appreciate the opportunity to appear in front of you and comment in the unfiled agreements matter. We read with great interest ALJ Klein's recommendation that the parties attempt to achieve a creative solution in this case. In the past we understand from comments that the commission has made that there's been some frustration that fines that have

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been imposed go into the general fund. And we do want to state at the outset that we have been and are interested in working towards those creative solutions.

In considering the report and recommendation, we wish to return to the point that we made at the outset of these proceedings, and that is that we believe that this case is fundamentally about line drawing, what line should be drawn under Section 252 of the act. We also wish to point out that we believe that the lines and the line drawing that's at issue here occurred in the past before there was a clear standard that was set out by the FCC. Indeed, the most recent agreement that's at issue in this docket was entered into in July of 2001, approximately a year and a half ago. Thus, we believe and we hope that the unfiled agreements matter relates to past conduct as opposed to present or future conduct. And I'd like to start by talking about the -- what we believe are significant and far-reaching remedial steps that Qwest has put into place to ensure that these types of allegations remain in the past and do not recur.

First, the wholesale group at Qwest has undergone a management changeover. Qwest has a new

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executive vice president of wholesale, Pat Engels, who was brought in specifically by Richard Notebaert to head up that group.

CHAIR SCOTT: Brought in from where?

MR. SPIVACK: Brought in from I believe -- That's a good question. Let me check. She was with Ameritech prior to her -- a break in

her service and then came into Qwest.
CHAIR SCOTT: And Ameritech did a better job with wholesale relationships than Qwest has done?
MR. SPIVACK: Well, we think that she will act under the FCC's order, that she will --
CHAIR SCOTT: I'm just trying to get a sense of how impressed we should be by this change.
MR. SPIVACK: Well, I think that she is someone who does have a record of accomplishment at Ameritech, and I think she's someone who has the direction from the top management at Qwest to ensure that compliance is first and foremost.
CHAIR SCOTT: Who is she replacing?
MR. SPIVACK: She is replacing Gordon Martin, who was at Qwest for approximately ten months to a year. He, Mr. Martin, replaced Gregg Casey, the former executive vice president of

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wholesale, who departed Qwest at the end of 2001.
CHAIR SCOTT: Mr. Casey is the one pleading the fifth amendment in the proceedings out in DC?
MR. SPIVACK: Yeah. Yeah.
CHAIR SCOTT: And how does Audrey McKenney fit into this chain?
MR. SPIVACK: Well, since October 11th Audrey McKenney is no longer with Qwest. She is the former senior vice president of wholesale business development. And, as the commission knows, she is the signatory on many of these agreements.
CHAIR SCOTT: Who replaced Audrey McKenney?
MR. SPIVACK: Her -- Her department, wholesale business development, has actually been reorganized and restructured. So her functions -- Her department's functions have been taken over by other departments within Qwest, including wholesale service delivery.
CHAIR SCOTT: All right. Go ahead.
MR. SPIVACK: Thank you. Since March of 2002 Qwest provided the agreements at issue in this case to the commission for public review. Although they were not available for formal opt in as of

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March 2002, we believe it's relevant that at least they were available publicly for CLECs to examine and to use as a basis of negotiations. Since May of 2002 Qwest has been operating under a broad filing standard regarding new agreements that we believe is substantively the same as that the FCC adopted on October 4th. Under that standard Qwest has been filing all new agreements containing forward-looking obligations relating to 251(b) and (c) services.
Now that the FCC has announced its standard, Qwest does not intend to seek appellate review of that standard. Qwest, being the

petitioner, will adopt that standard for reviewing new agreements on a going-forward basis. Since May of 2002 as well, Qwest created a committee of experienced attorneys and employees with --

CHAIR SCOTT: We were going to talk about whether or not to adopt the ALJ report; right? It seems to me you've kind of asked for guidance, I gave it to you; and then you went, and we're pretty much talking about remedies, aren't we?

MR. SPIVACK: Well, I'm trying to put a context around the ALJ's report, which is that it relates to past conduct as opposed to future conduct.

CHAIR SCOTT: Oh, I see. All right. Okay.

COMMISSIONER JOHNSON: Peter, could you pull your microphone a --

MR. SPIVACK: Sure.

COMMISSIONER JOHNSON: -- little closer to you? Thank you.

MR. SPIVACK: The committee that reviews wholesale agreements meets once a week at 7:30 in the morning as well as on an as-needed basis. And any agreement that contains forward-looking terms has been put into a separate interconnection agreement amendment and filed with the relevant state commissions. Qwest will apply the FCC order and this committee has been charged with applying the FCC order to agreements, including past -- any past Minnesota agreements that are on file -- excuse me, that are still in effect and have not been named by the Department of Commerce in its complaint. These measures Qwest sincerely hopes and believes will ensure that it is compliant in the future with the Telecommunications Act of 1996, the FCC's order, and Minnesota state law.

Turning, Chair Scott, to the issue of the past conduct. As I mentioned at the outset, we respectfully suggest that this is a case about line drawing. When this proceeding began Qwest pointed out that there was not an existing standard or belief that -- for filing interconnection agreements under Section 252 of the act. And all parties, it seemed, agreed that the FCC had never set out a test or a definition. Because of this lack of clarity, Qwest sought the FCC's guidance on the definition of an interconnection agreement and what agreements must be filed under Section 252.

CHAIR SCOTT: Would you please tell me who the Qwest witness is who came to you and said, But for my lack of clarity as to whether or not these agreements needed to be filed, I would have filed them? Who is the witness that says that?

MR. SPIVACK: Well, in the record there's no witness who provided that testimony.

CHAIR SCOTT: I noticed that. So who is the person that says that?
MR. SPIVACK: Well --
CHAIR SCOTT: Tell me why this isn't just an attempt by good lawyers to put a spin on bad facts, and the spin doesn't fit very well with the facts.
MR. SPIVACK: Well, let me turn to some

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of the agreements that are at issue.
CHAIR SCOTT: You know, I'd have so much more respect for you folks if you would come in here and say, You know what, under U S WEST people really didn't care about 271 at this company; they said they did, but they really didn't; they really preferred to have their monopoly. Then Qwest came in and Nacchio made a big push for 271. And what happened here is we had a VP who got a little overexuberant and thought that doing some deals with some folks and keeping quiet would make her a star in the company and get 271 faster, and it didn't work. It blew up. Stuff that should have been filed didn't get filed.
I'd have so much more respect for you if you'd come in here and say that, instead of pretending that this was confusing when there isn't a soul from Qwest who is saying it was confusing. Do you see what I'm saying? But you don't do that. You were getting close this morning. I thought we might get there, but you didn't. Then you went back to this, my god, we're so confused; we're so confused we don't know how we got here from the airport. It doesn't -- It just doesn't make any sense. I feel like I have stupid stamped on my

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forehead.
MR. SPIVACK: Chair Scott, we're certainly not attempting to --
CHAIR SCOTT: Yeah, you are.
MR. SPIVACK: -- run something by the commission. I mean, the issue here is, at least in some cases, some of these agreements -- Let's take some of them. I mean, some of these agreements relate to the level of detail that needs to be filed. Things like the on-site provisioning team. That wasn't a provision that was filed and approved by the commission.
CHAIR SCOTT: So certainly there's evidence in the record then that shows this internal Qwest struggle with whether these agreements needed to be filed?
MR. SPIVACK: Well --
CHAIR SCOTT: Well, no, there isn't.
MR. SPIVACK: The evidence in the record I think comes from -- in two manners. I mean, the first is that some of the agreements weren't -- were filed, some of the provisions were filed; and it's a

question of the elaboration or the detail that needed to be filed. The other evidence in the record is that even where the agreements were not

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filed, there was an attempt to provide the same service to all CLECs. So essentially what you have, we believe, is if you look at that as a record, you've got situations where there is a question of or how much detail to file; and then you have evidence whether there was not an attempt to treat the CLECs differently.

CHAIR SCOTT: And who was struggling with these decisions? You just told me there's no witness identified in the record.

MR. SPIVACK: That's correct. I think it's --

CHAIR SCOTT: Do you know why? Because there wasn't a struggle. Because there was a conscious decision not to file them, not a struggle. I know what happens when people struggle. When people struggle they call up Mr. Oberlander, who has been at the commission as long as air, and they ask him. Or they call up the last staff person they work with. Or they call up the department and they say, Hey, would you oppose if we do this or support if we do that? I know what people do when they struggle. There's no evidence in the record of a struggle because there wasn't one.

MR. SPIVACK: Well, again, I think I

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would have to -- I'll make this point once and move on, unless the commission has other questions. But it does seem that from the evidence in the record over certain of the provisions there was a confusion over the amount of detail that needed to be filed. And that confusion is evidenced by the fact that a provision was filed that related to the same substance, in effect, and then there was an implementation of that agreement; and it was that implementation phase that was not filed. So the question in those types of agreements really becomes: Where is the line drawn? And Qwest drew the line at filing a general provision and then attempted to fill the business needs of CLECs on an individual case-by-case basis and, as a result, did not file the detail of those agreements.

And let me answer the chair's question in another way as well. I think if you look at the FCC's order, there was not a statement in the FCC's order that the standard was clear and self-evident. The FCC did not cite to preexisting orders or case law. It acted instead as if this was a question of first impression, which we submit that it was. And it --

CHAIR SCOTT: And the FCC decision was a

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complete victory for Qwest, according to the papers

you filed.
MR. SPIVACK: Well, no, but it was -- there were points at which the FCC did agree with Qwest's position.
CHAIR SCOTT: Yeah.
MR. SPIVACK: And the FCC did agree that historical settlements did not need to be filed. The FCC did agree that form orders and contracts did not need to be filed. The FCC did agree that agreements with bankrupt companies did not need to be filed.
CHAIR SCOTT: Were any of those three things you just articulated relevant to the issues before the commission?
MR. SPIVACK: Well, we believe that the historical settlements were because some of these agreements could be put in that context.
CHAIR SCOTT: Oh.
MR. SPIVACK: We also believe that the FCC found it necessary to specifically single out escalation and dispute resolution clauses. And it indicated that if those provisions were not -- were generally available -- where -- it indicated essentially that those provisions could be made

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available to other CLECs, which would meet the discrimination point.
CHAIR SCOTT: Why didn't Qwest go to the FCC for guidance back when it was struggling with whether or not to file these agreements?
MR. SPIVACK: I don't know that.
CHAIR SCOTT: Yeah. It's curious, isn't it? Because it sure feels a lot more like an attempt to end run this commission than it does to really get guidance from the FCC.
MR. SPIVACK: Well, with respect to that, Chair Scott, I mean, I think what the attempt was to try to articulate or have a national standard articulated that would be uniformly applied over the 14-state region that Qwest serves. It was certainly not an attempt to end run any commission so much as an attempt to try to get something that could and would be uniformly applicable. And we hope that's what we have achieved and what the FCC has provided.
We think there's other indications that this question was not as clear as perhaps some on the other side of the question might believe. Other state commissions have adopted different formulations prior to the FCC's articulation of the test.

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CHAIR SCOTT: Are we still talking remedies? Because this really doesn't go to whether we should adopt the ALJ's report, does it?
MR. SPIVACK: Well, we believe it goes to the intent or lack thereof in terms of knowingly and intentionally filing these -- these agreements. And

we think that the agreements is evident -- or the lack of clarity of the standard is evident in the fact that the parties to this proceeding proposed different standards and standards that were different in some respects, some material respects than the FCC adopted ultimately.

I guess the fundamental concern that we have with the report and recommendation from the standpoint of the evidence in the record is that as to certain of the agreements there is no evidence, we submit, that relates to Qwest's knowledge and intent that these agreements must be filed.

Chair Scott, you pointed out that there's no witness from Qwest who said that there was a struggle or an attempt to arrive at a filing decision. Nor is there a witness, we feel, that Qwest knew that these agreements needed to be filed. And so again and again in the report when there is a finding by the ALJ as to the knowledge and intent of

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Qwest, we submit that that is not based on a witness, it's not based on a document for the -- you know, for most of the agreements where there are issues about level of detail that needs to be filed or where there were issues about whether or not a particular agreement or provision fit within the definition of an interconnection agreement.

I can turn to the issue of discrimination, if the commission would like to, or I can wait to address this first issue of whether or not to adopt the ALJ's report and recommendation.

COMMISSIONER KOPPENDRAYER: Mr. Chair. Mr. Spivack, I -- back up a moment. You -- I think you were saying that there's no indication in the record that the ALJ put together that there was an -- an intention to not file?

MR. SPIVACK: What I was saying is there's no -- there's no witness who is a participant to the transactions who said we intentionally did not file these agreements.

COMMISSIONER KOPPENDRAYER: Okay.

CHAIR SCOTT: I guess I would say you should just do what you would like to do here this morning.

MR. SPIVACK: Okay. Thank you, Chair

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Scott. The other issue we think with the ALJ's report and recommendation that runs fundamentally throughout it is that at the Department of Commerce's urging the ALJ essentially made a finding that there was a -- there's per se discrimination; that the mere fact that a CLEC does not have a contractual commitment for a certain type of provision means that it's a fact that there is discrimination. We believe that the FCC order actually indicates to the contrary and that the 1996 act actually requires more; and that is a showing on

a case-by-case or agreement-by-agreement basis that there was, in fact, discrimination. And the FCC stated as much in its October 4th order when it talked about escalation and dispute resolution clauses. It stated that unless generally available such as filing -- excuse me, such as being made available on a CLEC's website that an agreement provision relating to escalation or dispute resolution had to be filed as an interconnection agreement. We think that the implication of this as well as the requirements under the 1996 act are that there be proof of actual discrimination as opposed to simply that provision not being in a contract with a particular CLEC. And many of the provisions

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that were at issue in this case we believe were generally available to CLECs. Things like the FOC standards and the Covad service level agreement. Things like the quarterly vice president meetings and the Eschelon agreements and McLeod agreements. The escalation charts in one of the escala -- in the Eschelon agreements. The escalation procedures, the Eschelon and McLeod agreements. The Qwest service management teams and the methodology for calculating local switching charges. The commercially reasonable efforts to ensure that service is not affected during the UNE-P conversion. And the listing of the end offices in the LERG, the end offices that were in the USLink/Infotel agreement. We think that those -- that evidence should be considered because we believe that those provisions were, in effect, available to all CLECs. They were generally available, they were made available by Qwest, and that that is evidence that should be considered by the commission rather than adopting the finding of per se discrimination.

In addition to whether a provision is generally available, we believe there's another inquiry that should be made before there is a finding of discrimination, and that is whether an

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agreement would be available for pick and choose under Section 252(i). Because we believe that if an agreement provision was not available for pick and choose, there cannot be harm to the CLECs that did not have the opportunity to opt into that agreement, and that that's a relevant factor under the penalty statute at issue here. We also think that under the --

COMMISSIONER JOHNSON: So what did you mean by that?

MR. SPIVACK: Well, what I'm trying to say is that if --

COMMISSIONER JOHNSON: If you didn't tell anybody, no one else would know.

MR. SPIVACK: Chair Scott, Commissioner Marshall (sic), what I'm trying to say is it's not

so much -- taking for argument's purposes that we didn't tell anyone about the provision so other CLECs did not know about it, we believe that what one must look at is whether, in fact, those CLECs have the same services that were provided in the substantive agreement. So, for example, with an escalation clause, if the CLECs had the opportunity -- the opportunity or received the same escalation procedure as Eschelon or McLeod received

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in a contractual commitment, we believe that that's a relevant factor for the commission to take into account.

COMMISSIONER KOPPENDRAYER: But, Mr. Spivack, excuse me, that's also then to assume that the pick and choose has no value.

MR. SPIVACK: Chair Scott, Commissioner Koppendrayer, we're not saying that the pick and choose has no value. What we're saying is for the -- in the context of trying to determine whether there was discrimination and whether there should be a penalty imposed, that that's a relevant factor to consider is whether there are provisions or preconditions to the particular provision that might make it impossible for other CLECs to opt into that -- that provision. And, you know, certainly some of them were -- controversial provisions could be analyzed that way.

So, for example, with the McLeod oral agreement for a 10 percent discount, one could look at that and say that that was a volume term commitment, if one accepts the ALJ's report, and that as a volume term commitment it was available only to CLECs who could make a similar volume term commitment. So we think that those are relevant

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considerations when determining or when trying to assess whether, in fact, there was discrimination against other CLECs.

COMMISSIONER REHA: Mr. --

COMMISSIONER KOPPENDRAYER: So -- I'm sorry. Go ahead.

COMMISSIONER REHA: No, go ahead.

COMMISSIONER KOPPENDRAYER: So then -- Some of us are attorneys here, and some of us aren't, and I'm not one of them. And that's neither bad nor good; it just takes me longer to understand what you're saying. So if there was no company that could meet the volume term agreement, then the fact that it was not made available could be considered not discriminatory?

MR. SPIVACK: Chair Scott, Commissioner Koppendrayer, that -- that is exactly the point I'm trying to make.

COMMISSIONER KOPPENDRAYER: So then we would conclude because -- because another company can't meet that term at that time, the agreement to

not let anybody know it has no discriminatory intent at all?

MR. SPIVACK: Chair Scott, Commissioner Koppendrayer, it has no discriminatory intent. And also, perhaps more importantly, it has no discriminatory impact. There's no effect from the fact that that agreement provision was not made available.

CHAIR SCOTT: Commissioner Reha.

COMMISSIONER REHA: Yeah, Mr. Chair. I understand your argument that -- that you feel the FCC indicated in their order of October 4 that simply because the agreements weren't filed you feel that that doesn't mean there's per se discrimination. But -- And your suggestion is that the ALJ found that by failing to -- Qwest failing to file the interconnection agreements that it was per se discrimination. And so reading that argument, I went back again through the ALJ's report to try to see whether that was accurate. And I found -- and also within the record I found a lot of information in there where the ALJ didn't simply say by failing to file the agreement it was per se discrimination. They were specific findings that there was discrimination.

So, for example, there's one finding that goes in a little more detail that I think you've claimed that maybe the provisions are available either on your website or the provisions are available in your SGAT. First of all, there doesn't seem to be any evidence in the record about your website and whether or not this information was available on your website or not. And I would think that if it were available during the course of the hearing, that evidence should have come out and had been offered to show, hey, you know, we had this fully available on our website for any CLEC to see and to attempt to enter into some negotiation. But that isn't in the record, at least not that I could find.

And the one mention of the SGAT in Eschelon agreement number -- Eschelon agreement number 1 is a finding in 76 that says, Qwest's SGAT, however, permits no discovery except for the exchange of documents being necessary by the arbitrator to an understanding and determination of the dispute. And the judge goes on to say, There's no approved interconnection agreement in Minnesota that gives any CLEC the same dispute resolution mechanism set forth in that special agreement.

So I think that's more than saying that somehow failing to file the interconnection agreement is per se discrimination. I think there's specific facts upon which the judge has relied and

made findings on that indicate that there was indeed discriminatory impact as a base of a term and condition that wasn't available to CLECs.

Now, granted there's no specific evidence in the record that CLEC X was harmed X amount of dollars by not being permitted to pick and choose a particular matter that the -- a special agreement set forth for a competing CLEC; but I don't think that that's what's necessary, and I don't think that's what the FCC is saying. So I guess I disagree with your conclusion that the ALJ just simply said it's per se discrimination because the interconnect -- interconnection agreement wasn't filed.

And then a second thing too that disturbs me about this and -- by reading your -- by reading the FCC's order and reading your post-hearing -- your comments, your most recent comments that discuss that is that throughout this proceeding it's Qwest that seems to be making the unilateral decision as to whether or not an interconnection agreement should or should not be filed. And, I mean, there's even circumstances where one of the CLECs wanted a written agreement and suggested that it wanted -- they wanted it to be filed, and the

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company absolutely refused. So that disturbs me, that the holder of the product, the holder of the ability for the CLECs to be able to compete is the one that's unilaterally making the decisions as to whether or not agreements should or shouldn't be filed.

And I -- We're not at the penalty phase at this particular point, but I would certainly be supportive of nonmonetary penalties in addition to monetary penalties, but nonmonetary penalties -- I don't know if penalties is the right word -- but some circumstances to avoid that unilateral activity on the part of Qwest that -- that perhaps we should look at every interconnection agreement and perhaps we should be notified whenever there's a negotiation that's going on with respect to the provisioning of ongoing interconnection terms.

So I guess if you want to address some of those comments, Mr. Spivack, go right ahead.

MR. SPIVACK: Chair Scott, Commissioner Reha, thank you. When we're talking about the ALJ's findings of per se discrimination, what we are referring to is that the -- the fact that in the report again and again what the ALJ concludes is that by failing to make the provision available to

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other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. Section 251. And our response is that there is evidence in the record showing that other CLECs received the same services, that other CLECs

received the same ability to escalate disputes about provisioning and about billing, that other CLECs received the same -- the same types of services that Qwest provided to McLeod and Eschelon and the other CLECs who are parties to the agreement. So you're right there's not evidence that, for example, prior to March or prior to August 2002 Qwest was posting these provisions on its website. You're absolutely right. But what we are referring to is that they are -- they were made generally available in other ways.

COMMISSIONER REHA: Well, how -- how was the -- for example, the discovery privilege in the special Eschelon I agreement made available to other CLECs if they didn't know about it?

MR. SPIVACK: That particular provision to my knowledge was not.

COMMISSIONER REHA: Okay.

MR. SPIVACK: So --

COMMISSIONER REHA: Because, I mean,

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there I think there's some detail that there was discrimination, because what was available to someone in a special status, privileged status was not available to all others. And I find other -- That's just one example. There are other examples in the record and in the findings that there are factual -- there's factual information that treated those in the specialized status where there was a special agreement, secret agreement that wasn't available generally to other -- other CLECs. And in those circumstances I don't see how you can say that that was not -- didn't have a discriminatory impact.

MR. SPIVACK: Chair Scott, Commissioner Reha, if I -- if I may answer that question. That I -- I think actually is what we would -- what we would suggest is that there is a distinction between a provision not being available to other CLECs and it actually having a discriminatory impact. Because there is not, for example, evidence in the record that CLECs went into disputes and because they did not have access to the two discovery depositions that are provided for in the -- the particular provision that you cite that they suffered as a result.

COMMISSIONER REHA: So you feel that

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there should be testimony in evidence with respect to some type of monetary damage, if you will, or some proof of some other CLEC damage for us to be able to conclude that your failing to file the agreements and all the other testimony evidence that goes along with that was discrimination?

MR. SPIVACK: Chair Scott, Commissioner Reha, what we would suggest is that the commission look at all of the factors, including whether or not there was an impact, and that we believe that the --

there is some context that is provided by whether or not there is any evidence of a discriminatory impact.

COMMISSIONER REHA: Okay. Because it seems it's kind of a circular argument. Because how could a CLEC who doesn't know whether these provisions are available to them come in and prove affirmatively that -- that and quantify their harm?

MR. SPIVACK: Chair Scott, Commissioner Reha, there -- in -- in many instances we believe that they couldn't because there wasn't harm; that they didn't --

COMMISSIONER REHA: That begs the question, doesn't it?

MR. SPIVACK: Chair Scott, Commissioner

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Reha, it's -- We believe it doesn't beg the question or it isn't a circular argument because in many instances these are provisions that don't give a CLEC an advantage, we believe, over another.

COMMISSIONER REHA: Discounts don't give one CLEC an advantage over another?

MR. SPIVACK: Now, there -- there -- Now, what I'm -- Chair Scott, Commissioner Reha, what I'm talking about is sort of the nonmonetary-related provisions. You know, clearly discounts and other types of monetary payments bring in different issues and --

COMMISSIONER REHA: Specialized personnel availability to one CLEC not available to others, that's not an advantage?

MR. SPIVACK: Chair Scott, Commissioner Reha, that's a provision that we believe was available to --

COMMISSIONER REHA: Where, on your website?

MR. SPIVACK: In a filed interconnection agreement, the on-site provisioning team was available.

COMMISSIONER JOHNSON: Later on. Just recently.

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MR. SPIVACK: Chair Scott, Commissioner Johnson, it was actually filed in I believe January 2001 as an interconnection agreement -- I believe that's the correct date -- and approved by the commission at that time.

Chair Scott, Commissioner Reha, there are two other issues that you've raised that I'd like to address. I mean, the first is the issue about whether or not these were unilateral decisions for the most part by Qwest. I guess we respectfully disagree. We think that there were two parties to each of these agreements. There may have been -- Well, we think that there were two parties to these agreements and --

COMMISSIONER REHA: And I agree with you.

I don't think some of the CLECs here, the ones that entered into the special privilege agreements with the company, have clean hands here by any means. And, you know, perhaps we could -- should open up a new investigation to look at those issues as well. But there are circumstances here where Qwest made the unilateral decision not to file these, and there's specific findings of that effect in the ALJ's report.

MR. SPIVACK: Chair Scott, Commissioner

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Reha, there are, I believe, some provisions where that -- that -- the documents suggest that. I think that that is -- that is -- Another -- Chair Scott, Commissioner Reha, another issue that you addressed is sort of on a going-forward basis what to do. You know, I've tried to outline the remedial steps that Qwest has taken. And I believe that those are -- that those go a long way towards addressing the concerns that the commission may have. Qwest certainly is not, however, averse to whatever the commission feels is necessary from the standpoint of a compliance agreement or some kind of compliance piece to ensure that that process is working correctly. I do not want to leave anyone with the impression that Qwest has any objection to any such provision.

COMMISSIONER REHA: I appreciate that.

MR. SPIVACK: Chair Scott, Commissioner Reha, just one other -- one other point I think that bears noting is that with regard to the provisions at issue in this, the only testimony from CLECs that they would have been interested or would have opted into the nonmonetary provisions related to the on-site provisioning team. And yet we thought it was interesting that in the record and at the

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hearings when asked the CLECs stated that they did not review the filed interconnection agreement and that they did not know that the on-site provisioning team had been filed. And we believe that that's important because, you know, with regard to the one provision that they were focusing on, they did not -- the CLECs did not take advantage of the fact that that had been filed, been made publicly available and seek to opt in.

Chair Scott, the basic themes that you've noted that outrun -- run through our submission are that there was not a standard, that there was evidence of -- there was evidence of confusion. There has been evidence of confusion, if you look at the way that the state commissions have approached this with the way the parties tried to define their filing obligations; that the evidence lacks, we believe, evidence that -- the hearing evidence lacks a showing that there was a knowing and intentional decision not to file these provisions. And, perhaps

most importantly, that the findings that the ALJ made regarding discrimination we believe should be examined because they need to take into account the evidence that Qwest submitted regarding the provision of services to CLECs and the fact that

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these provisions in many instances were available to CLECs in other ways.

MR. TOPP: Chair Scott.

CHAIR SCOTT: Mr. Topp.

MR. TOPP: If it would be possible for us, there were a couple of issues raised that if we could have a moment to discuss kind of before we wrap up our presentation --

CHAIR SCOTT: Yeah.

MR. TOPP: -- we would appreciate that.

CHAIR SCOTT: Yeah, that's no problem. Okay. How much time? Do you want us to take a break or what do you want?

MR. TOPP: Yeah, if we could take a five, ten-minute break, that would be great.

CHAIR SCOTT: Let's come back at 10:30. It's 20 past. Let's come back at 10:30. We'll take a break.

(Whereupon, a recess was held from 10:20 a.m. to 10:35 a.m.)

CHAIR SCOTT: All right. Let's come back together after our break. Go back to Qwest.

Mr. Topp.

MR. TOPP: Yes, thank you, Chair Scott. I just wanted to follow up on a couple of points

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that you raised. Specifically with respect to our exceptions. I mean, first of all, I want to state, you know, we're here in a context where we've got concerns about an order and we're facing significant penalties, and so we're raising those concerns as a part of this proceeding.

But, Chair Scott, you asked a question about who struggled with these particular issues, and I think that does turn to a heart of an issue that we've really addressed within the company. I mean, the fact of the matter is when these agreements were in place --

CHAIR SCOTT: Talking about evidence in the record. I don't want after the fact come tell the commissioner about how the lawyers struggled. I want evidence in the record that justifies this legal theory that is basically the entire post-hearing brief.

MR. TOPP: And my point is is at the time that these agreements were entered into, the people that should have been struggling with these issues within the company were not. There was not an internal formal process in place for making these sorts of decisions. And what I really want to make clear to the commission is we have -- you know, we

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have brought formal controls in place, we've gotten the people who should be struggling with these issues involved in those issues. We're open when we get to the remedies portion of this proceeding to making sure that that is an open process in which, you know, interested parties are involved and can see what we're doing and are comfortable with the way we are approaching these issues. And I wanted to emphasize that I think the concerns that you have raised are concerns that we as a company are addressing and will continue to address on a going-forward basis.

CHAIR SCOTT: But how often will we do this? How many times will we do this? You know, I -- I sat here at the U S WEST/Qwest merger, and I would have separated U S WEST because I didn't believe U S WEST had what it took to meet its responsibilities under the federal act. I thought it proved it time and time again. And people looked at me like you might a senile old grandfather and patted me on the hand and smiled and said, Well, just -- you just wait; Qwest is going to do better; it will be all right; Qwest is going to do better. So I said, All right, I won't pursue it; I'll -- I'll wait and see what Qwest does.

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This docket to me is a docket that needs to open the eyes of one of two parties; either you or me, this commission. Somebody's eyes need to be open. Either you need to say, Oh, my god, we screwed up; or I need to say, Do we want this kind of phone company in our state. Because now we've given Qwest some time. We've given Qwest time to show that they would be different. They are different. They're worse. They're better at it because they're smarter, but they're worse. And this docket shows that it started as soon as you came into Minnesota.

And so for you to sit there today and tell me about these remedial measures you've taken, I have to tell you it rings kind of hollow, just like it rings hollow to hear that now you've got Richard Notebaert at the helm. Because Joe Nacchio was going to be different. And I went around and told people that. I believed it. Yeah, it's going to be different; it's going to be better. It's not.

And so I think there's a big issue for this commission today that goes well beyond money, and it goes to is this the kind of phone company we want in our state. Because you know what, we don't have to have it. We don't have to have it.

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And I have to tell you I would not have known Audrey McKenney was a bad apple. I would not have known. And you can give me this list of names that you've replaced and things you've done. I

wouldn't know where the bad apples are. And that tells me that I really am not in a position where I can fashion the management that can successfully pull this off under the federal act. It just tells me that maybe we need new blood. Maybe we need new people to do it.

MR. TOPP: Well, and I think, you know, we have put in new people. So there is -- I mean --

CHAIR SCOTT: Again. Again. You see, again. And when does this commission say they just can't do it; they can't get the job done? Seven years in February since the passage of the act. We're still sitting in Minnesota hearing about how you're putting people in who hopefully will get the job done.

MR. TOPP: And a lot of the issues that have been raised over the last seven years there have been terrific strides made by our company to address those issues. If you look at our wholesale performance, it has improved dramatically. If you look at investment within the state --

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CHAIR SCOTT: But now we know that the wholesale performance didn't even have all the performance data in it because you had deals with CLECs that said they'd keep it out.

MR. TOPP: That --

CHAIR SCOTT: See? So, you know, there's a big credibility issue here with you folks.

MR. TOPP: Well --

CHAIR SCOTT: And it's not supposed to affect 271. No. The market's open. We're sitting here today, but the market's open because you've changed everything going forward. I mean, come on.

MR. TOPP: As to the accuracy of the wholesale data, that's been an issue that has been addressed repeatedly as a part of the OSS proceeding. We -- And it certainly does include performance that relates to the CLECs that are at issue in this case, and we have addressed that as a part of that proceeding. I think that -- Having said that, I think it's critical, you know, we act within a statutory framework, and that is the Telecommunications Act of 1996. And we've got to give that an opportunity to work. And we think that the types of controls that we are talking about here, along with the other component pieces that we

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have talked about at length, will give that an opportunity to work.

CHAIR SCOTT: Is Qwest concluding then?

MR. TOPP: We are.

CHAIR SCOTT: All right. Any other final questions for Qwest? We can always come back.

All right. Who would like to go next then? Who knows the song Everything Is Beautiful? Anybody in the room know the song Everything Is

APPENDIX N

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ARIZONA STAFF SUGGESTS FINING QWEST $15 MILLION FOR UNFILED AGREEMENTS

The Arizona Corporation Commission staff has recommended fining Qwest Corp. $15 million for its failure to file certain interconnection agreements it entered into with competitors. The commission is holding an evidentiary hearing this week before an administrative law judge (ALJ) to determine whether Qwest committed willful and intentional violation of ACC rules and processes by not filing the agreements.

In addition to the $15 million fine, ACC staff has recommended that an 18-month retroactive discount and an 18-month prospective discount be made available to all competitive local exchange carriers (CLECs) in Arizona in an amount equal to the discounts received by the competitors that entered into the unfiled agreements with Qwest, a staff member told TRDaily.

The staff also suggested that Qwest be required to develop a code of conduct to govern its relationships with CLECs. Under the staff's proposal, CLECs would be allowed to comment on the proposal and the commission would be charged with approving a final code of conduct. In addition, the staff recommended that an independent third party be brought into the mix to monitor Qwest's wholesale transactions going forward, the staff member explained.

The ACC launched its investigation into Qwest's unfiled agreements in March 2002. As a result, Qwest's bid to enter the in-region interLATA (local access and transport area) services market in Arizona has been put on hold. The staff member said that following this week's evidentiary hearing, the ALJ may request post-hearing briefs, at which point the judge will issue a draft recommendation. The proceeding could run into early summer.

A Qwest spokesman told TRDaily that the local phone market was highly competitive in Arizona (with more than 20% penetration by competitive carriers) and the allegation that the unfiled agreements in question somehow

thwarted competition weren't supported by the numbers. The spokesman added that, once Qwest was notified that the commission was looking into the unfiled agreements, the company fully cooperated with ACC staff.

He said there weren't any clear standards on filing interconnection agreements until the FCC issued a decision on the matter in October 2002. Since that time, the company has instituted compliance standards.

In Minnesota, the Public Utilities Commission ruled that Qwest must provide its competitors with a laundry list of discounts and credits to make up for the incumbent's failure to file interconnection agreements it had entered with CLECs in that state. If Qwest fails to abide by the Minnesota regulator's instructions, it could face a $26 million fine. Qwest challenged the Minnesota ruling last week, maintaining that the commission had overstepped its authority (TRDaily, March12). - Margaret Boles, mboles@tr.com

TR Daily, March 18, 2003

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Telecommunications Reports Daily; Copied with permission from Aspen Publishers; April 16, 2003; Author Margaret Boles; "Arizona Staff Suggests Fining Qwest $15 Million for Unfiled Agreements"; March 18, 2003; www.aspenpublishers.com.

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